TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No: ~~395~~ 126

MICHAEL LYNCH, LEPOLAT GREGET, ANDREW BERGEROTS, ISADORE BERNAMAYOUS, EBENEZER MORRELL, LOUIS HAMEL AND JOHN DOE, PLAINTIFFS IN ERROR,

vs.

CARMEM S. DE BERNAL AND JOSE DE JESUS BERNAL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED NOVEMBER 25, 1848.

SUPREME COURT OF THE UNITED STATES.

No. 305

MICHAEL LYNCH, LEPOLAT GREGET, ANDREW BERGEROTS, ISADORE BERNAMAYOUS, EBENEZER MORRELL, LOUIS HAMEL AND JOHN DOE, PLAINTIFFS IN ERROR,

vs.

CARMAN S. DE BERNAL AND JOSE DE JESUS BERNAL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the Supreme Court of the State of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Supreme Court before you, between Carmen S. De Bernal, Jose De Jesus Bernal, and Michael Lynch, Leopold Greget, Andre Bergerots, Isadore Bernamayous, Ebenezer Morrell, Louis Hamel, John Doe, a manifest error hath happened, to the great damage of the said Michael Lynch, Leopold Greget, Andre Bergerots, Isadore Bernamayous, Ebenezer Morrell, Louis Hamel and John Doe, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be

2 therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court of the United States, to be there and then held, that the record and proceedings being inspected, the said Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this seventeenth day of July, A. D. 1868, and of the independence of the United States the ninety-second.

Attest my hand and the seal of the Circuit Court of the

3 United States for the district of California.

[SEAL.] GEO. E. WHITNEY, *Clerk.*

The above writ of error is hereby allowed.

STEPHEN J. FIELD,
Associate Justice of U. S. Supreme Ct.

4

Endorsed: Supreme Court of the United States. 1565. Michael Lynch. Leopold Greget. Andre Bergerots, Isadore Bernamayous, Ebenezer Morrell, Louis Hamel and John Doe, plaintiffs in error, vs. Carmen S. De Bernal and Jose De Jesus Bernal, defendants in error. Writ of error. Filed July 18, 1868. Geo. Seckel, clerk Supreme Court, California.

5 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judge of the Supreme Court of the State of California, greetings:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Supreme Court before

you, between Carmen S. De Bernal, Jose De Jesus Bernal, and Michael Lynch, Leopold Greget, Andre Bergerots, Isadore Bernamayous, Ebenezer Morrell, Louis Hamel, John Doe, a manifest error hath happened, to the great damage of the said Michael Lynch, Leopold Greget, Andre Bergerots, Isadore Bernamayous, Ebenezer Morrell, Louis Hamel and John Doe, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning
6 the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court of the United States to be there and then held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this seventeenth day of July, A. D. 1868, and of the independence of the United States the ninety-second.

Attest my hand and the seal of the Circuit Court of the United States for the district of California.

(Signed) GEO. E. WHITNEY, *Clerk.*

[Seal U. S. Circuit Court, dist. of California.]

The above writ of error is hereby allowed.

(Signed) STEPHEN J. FIELD,

Associate Justice of the U. S. Supreme Court.

7

Endorsed: Supreme Court of the United States. 1565. Michael Lynch, Leopold Greget, Andre Bergerots, Isadore Bernamayous, Ebenezer Morrell, Louis Hamel and John Doe, plaintiffs in error, vs. Carmen S. De Bernal and Jose De Jesus Bernal, defendants in error. Copy of a writ of error lodged, in pursuance of the statute of the United States made and provided, for the above-named Carmen S. De Bernal, and Jose De Jesus Bernal, defendants in error. J. N. Hoge, attorney for the plaintiffs in error. Filed July 18, 1868. G. Seckel, clerk Supreme Court of California.

8 In the Supreme Court of the United States.

MICHAEL LYNCH *et als.*, plaintiffs in error,
vs.
CARMEN S. DE BERNAL and JOSE DE JESUS Bernal, defendants in error.

UNITED STATES OF AMERICA:

District of California, State of California.
City and County of San Francisco, ss:

John J. Crowly, being duly sworn, deposes and says: That he is a white male citizen of the United States, over the age of twenty-one years; that on Monday, the twelfth day of October, A. D. 1868, in the city and county of San Francisco, State of California, he served the citation hereunto annexed on the said Carmen S. de Bernal, one
9 of the defendants in error therein named, by exhibiting and reading to her the said citation, and at the same time delivering to her a full, true, and correct copy thereof.

Deponent further says, that on Wednesday, October the 14th, A. D. 1868, at Spanishtown, San Mateo county, State of California, he served the said citation hereunto annexed on the said Jose De Jesus Bernal, the other defendant in error therein named, by exhibiting and reading to him the same, and at the same time delivering to him a full, true, and correct copy thereof.

JOHN J. CROWLY.

Subscribed and sworn to before me this fifteenth day of October, A. D. 1868.

CHAS. W. GRANT,
Com'r U. S. Circuit Court.

10 UNITED STATES OF AMERICA, *ss:*

To Carmen S. De Bernal and Jose De Jesus Bernal:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of California, wherein Michael Lynch, Leopold Greget, Andre Bergerots, Isadore Bernamayous, Ebenezer Morrell, Louis Hamel, and John Doe are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stephen J. Field, one of the justices of the said Supreme Court of the United States, this eight-
11 eenth day of July, in the year of our Lord one thousand eight hundred and sixty-eight.

STEPHEN J. FIELD,
Associate Justice of U. S. Sup. Court.

Due service upon me, in the city and county of San Francisco, California, on this twelfth day of October, A. D. 1868, of a copy of the foregoing citation, is hereby admitted.

D. P. BARSTOW, *Att'y for Def'ts in Error.*

Endorsed: Supreme Court of the United States. Michael Lynch et als., plaintiffs in error vs. Carmen S. De Bernal and Jose De Jesus Bernal, defendants in error. Citation.

12 In the Supreme Court of the United States.

MICHAEL LYNCH, LEOPOLD GREGET, ANDRE Bergerots, Isadore Bernamayous, Ebenezer Morrell, Louis Hamel and John Doe, plaintiffs in error,
vs.
CARMEN S. DE BERNAL and JOSE DE JESUS Bernal, defendants in error.
} In error.

Know all men by these presents that we, Michael Lynch, John Center, and Egbert Judson are held and firmly bound unto the above-named Carmen S. De Bernal and Jose De Jesus Bernal, in the sum of twenty thousand dollars, to be paid to the said Carmen S. De Bernal and Jose De Jesus Bernal, their executors or administrators: to which payment well and truly to be made, we bind
13 ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this seventeenth day of July, in the year of our Lord 1868.

Whereas the above-named Michael Lynch, Leopold Greget, Andre Bergerots, Isadore Bernamayous, Ebenezer Morrell, Louis Hamel, and John Doe, plaintiffs in error in the above-entitled cause, have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered by the Supreme Court of the State of California, in the suit wherein the said Carmen S. De Bernal and Jose De Jesus Bernal are plaintiffs, and the said Michael Lynch, Leopold Greget, Andre Bergerots, Isadore Bernamayous, Ebenezer Morrell, Louis Hamel, and John Doe, are defendants, in favor of the said Carmen S. De Bernal and Jose De Jesus Bernal:

14 Now, therefore, the condition of this obligation is such, that if the above-named Michael Lynch, Leopold Greget, Andre Bergerots, Isadore Bernamayous, Ebenezer Morrell, Louis Hamel, and John Doe, plaintiffs in error, shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

[L. S.] MICHAEL LYNCH.
[L. S.] JOHN CENTER.
[L. S.] EGBERT JUDSON.

Sealed and delivered in presence of—
G. G. W. HOGE.
R. P. LEWIS.

The words "and Jose de Jesus Bernal" were interlined over 3d line from bottom of first page before execution and delivery.

R. P. LEWIS.
G. G. W. HOGE.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

John Center and Egbert Judson, whose names are subscribed as the sureties to the above bond, being severally duly sworn, each for himself, says that he is worth the sum in the said bond specified as the penalty thereof, viz: the sum of $20,000\frac{00}{100}$ over and above all his debts and liabilities, exclusive of property exempt from execution.

JOHN CENTER.
EGBERT JUDSON.

Subscribed and sworn to before me this 17th day of July, 1868.
[SEAL.] R. P. LEWIS,
Notary Public.

15 Endorsed: Supreme Court of the United States. 1565. Michael Lynch et als., plaintiffs in error vs. Carmen S. De Bernal and Jose De Jesus Bernal, defendants in error. Bond. The within bond is approved this 17th day of July, 1868. Stephen J. Field, associate justice U. S. Sup. C't. Filed July 18, 1868. Geo. Seckel, clerk Supreme Court of California.

16 In the Supreme Court of the State of Calfornia.

Complaint.

CARMEN S. DE BERNAL and JOSE DE JESUS Bernal
vs.
MICHAEL LYNCH, LEOPOLD GREGET, ANDRE Bergerots, Isadore Bernamayous, Ebenezer Morrell, Louis Hamel and John Doe.
} Transcript on appeal.

DISTRICT COURT, *Fourth Judicial District,*
City and County of San Francisco, State of California:

The plaintiffs above named complain against the said defendants, and aver, that heretofore, to wit, on and before the 1st day
17 of January, 1850, the said plaintiffs were and have ever since continued to be, and now are, the owners of one undivided one-half, and entitled to the possession of all that certain tract of land situate, lying and being in the city and county of San Francisco, adjoining the Mission Church property, at the Mission Dolores, (so called,) and bounded and described as follows, viz: Commencing at a stake marked B 6, at the northwestern corner of said tract, in the willow fence which forms the southern boundary of the tract of land

called "Suerte en Dolores," finally surveyed and confirmed to the heirs of Francisco Guerrero Palomares, as shown on the plat of the official survey of tract of land in Mission Dolores, finally confirmed to "C. S. De Bernal et al.," now on file in the office of the U. S. Surveyor General, in said city and county; running thence south $8\frac{1}{4}°$, E. 8.43 chains; thence north $81\frac{3}{4}°$, E. 5.19 chains; thence north 4°, west 3.99 chains; thence north 81°, E. 2.95 chains; thence north $8\frac{1}{4}°$. W. 4.38 chains, to the northeast corner of said tract, at the junction of a ditch or stream with the southern boundary of said "Suerte en Dolores;" and thence, on said southern boundary, south $81\frac{3}{4}°$, west 8.43 chains, to the place of beginning, containing five 86-100 acres of land.

And that the plaintiffs were likewise afterwards, to wit, on the 1st day of January, 1859, in the possession of said tract of land, and so remained and continued in possession thereof until afterwards,
18 to wit, on the day and year last aforesaid, the defendants with force and arms entered into and upon said tract of land, and ejected, expelled and removed said plaintiffs therefrom, and thence to the present time have unlawfully withheld, and still do unlawfully withhold, from said plaintiffs the possession thereof to their damage, to wit, in the sum of two thousand dollars.

Wherefore the plaintiffs pray judgment against the defendants for the possession of said premises, and for their damages aforesaid in the sum of two thousand dollars, and for costs.

By their attorneys:

D. P. & A. BARSTOW.

Endorsed: Filed Aug. 17th, 1862. Wm. Loewy, clerk, per Jas. E. Ashcom, D. C.

District Court of the fourth judicial district in and for the city and county of San Francisco.

Answer.

CARMEN S. DE BERNAL *et al.*
vs.
MICHAEL LYNCH *et als.*

The defendants, for answer to the complaint in the above-
19 entitled cause, deny each and every allegation thereof.

J. B. CROCKETT,
Attorney for Defendants.

Endorsed: Filed Sept. 5th, 1863. Wm. Loewy, clerk; by L. J. Lee, D. C.

In the District Court of the fourth judicial district of the State of California, in and for the city and county of San Francisco.

Subpoena.

BERNAL *et al.*
vs.
LYNCH *et als.*

The people of the State of California send greeting to J. Hunt and E. H. Washburn:

We command you that, all and singular business and excuses being set aside, you appear and attend before our District Court of the fourth judicial district of the State of California, in and for the city and county of San Francisco, at a term of said court to be held at the court-house of said court, in the city hall of said city and county of San Francisco, on the 30th day of January, A. D. 1867, at ten o'clock a. m., then and there to testify in the above-stated cause, now pending in said District Court, on the part of plaintiffs; and for a failure to attend you will be deemed guilty of a contempt of court, and liable to pay all losses and damages sustained thereby to the parties aggrieved, and forfeit one hundred dollars in addition thereto.

Witness Hon. E. D. Sawyer, judge of the fourth judicial district, at the court-house in the city and county of San Francisco, this 29th day of January, A. D. 1867.

Attest my hand and seal of said court the day and year last above mentioned.

[SEAL.]

WM. LOEWY, *Clerk.*
By JAS. E. ASHCOM, *Deputy Clerk.*

Endorsed—

SHERIFF'S OFFICE,
City and County of San Francisco.

I hereby certify that I received the within subpœna on the 29th day of January, 1867, and personally served the same the same day upon Jonathan Hunt, one of the therein-named witnesses, by delivering to said witness personally, in this city and county, a copy of said subpœna, and at the same time showing to him this original, and paying to him his legal fee of two dollars.

I was unable to find the other witness, E. H. Washburn, but left the subpœna at his place of business, with the witness fee.

HENRY L. DAVIS, *Sheriff.*
By H. D. LAMMOT, *Deputy.*

21 District Court of the fourth judicial district in and for the city and county of San Francisco.

Supplemental answer.

C. S. DE BERNAL *et al.*
vs.
M. LYNCH *et als.*

The defendants, for an additional and supplemental answer herein, aver that since the commencement of this action, whatever title the plaintiffs had at the time of the commencement of this action, has ceased and determined by a sale thereof for taxes due to the State of California, and to the city and county of San Francisco; at which sale the premises described in the complaint were sold to one Isaac N. Thorne for said taxes, in due course of law, and the collector of taxes, after the time for redemption had expired, and there having been no redemption thereof, by his deeds duly made, executed and delivered, conveyed said premises to said Isaac N. Thorne, who is now the owner in fee of said premises; and they aver the assessment for taxes under which said sale was made was valid and legal; that the said sale was made in accordance with law, and the said conveyances are valid and operative in law to vest in said Thorne whatever title or right of possession the plaintiffs had at the commencement of this action.

J. B. CROCKETT,
Attorney for Defendants.

22 Endorsed: Filed January 31st, 1868. Wm. Loewy, clerk; by Jno. F. Boden, D. C.

Fourth District Court, city and county of San Francisco, State of California.

Agreed statement.

BERNAL *et al.*
vs.
LYNCH *et als.*

It was admitted, for the purposes of the trial of this cause, as follows:

1st. That the land described in the complaint is the same land described in the final survey under the decree of confirmation of the U. S. Circuit Court, in suit of Bernal et al. vs. The United States; but the defendant does not admit that the land included in the final survey is the same land described in said decree.

2d. That the same was claimed by and in the possession of one Theodore Dehon long prior to and down to the time of his death, which occurred on or about the 24th day of June, 1861; that during

the lifetime of said Dehon, and from and after the commencement of the year 1859, the said Lynch was his agent, and as such was in charge of the premises described in the complaint.

3d. That on or about the 24th day of January, 1863, de-
23 fendant Lynch was appointed by the Probate Court of the city and county of San Francisco, the administrator, with the will annexed, of said Theodore Dehon, deceased.

4th. That as such administrator the said Lynch immediately took possession of said lands, claiming the same as the property of the estate, and rented the same to tenants, and has had such possession from the time of his appointment as administrator since prior to the commencement of this action continuously to the present time; that the other defendants were in possession of the premises at the commencement of this action as tenants under said Lynch, administrator as aforesaid.

5th. That William Dehon is one of the brothers of Theodore Dehon, deceased, and as such, on the death of said Theodore, was appointed executor of the will by the Probate Court having jurisdiction thereof at the place of residence of the deceased.

Endorsed: Filed January 30, 1867. Wm. Loewy, clerk; by Jno. F. Boden, D. C.

24 In the District Court of the fourth judicial district of the State of California, in and for the city and county of San Francisco:

CARMEN SIBRIAN DE BERNAL *et al.*
vs.
MICHAEL LYNCH *et al.*

Disbursements.

Memorandum of costs and disbursements on behalf of plaintiffs.

Sheriff's fee	$10 50
Clerk's fee	
Witness' fees	4 90
Affidavit to this file	50

CITY AND COUNTY OF SAN FRANCISCO, *ss*:

D. P. Barstow, being sworn, deposes and says: That he is one of the attorneys for plaintiffs in the above-entitled action, and as such is better informed relative to the above costs and disbursements than the said plaintiffs. That the items in the above memorandum contained are correct, to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in said action.

D. P. BARSTOW.

Subscribed and sworn to before me, this day of August, A. D. 1867.

ALFRED BARSTOW,
Justice of the Peace.

25 Endorsed: Filed this 22d day of August, A. D. 1867. Wm. Loewy, clerk. Per Jas. E. Ashcom, deputy clerk.

In the District Court of the fourth judicial district, in and for the city and county of San Francisco and State of California.

Findings.

CARTEN SIBRIAN DE BERNAL, Jose de Jesus Bernal, plaintiffs,
vs.
MICHAEL LYNCH *et als.*, defendants.

This cause came on to be tried by the court, without a jury (neither party requiring a jury,) on the day of 1867, the plaintiffs appearing by their attorneys D. P. Barstow and J. S. Blatchly, and the defendants by their attorney J. B. Crockett; and the pleadings having been read and the proofs of the respective parties presented, and after hearing the arguments of counsel, and having duly considered the same, the court finds the facts to be as follows, to wit:

1st. That the land in contest in this case is situate at the Mission Dolores, in said city and county of San Francisco, west of Larkin street and northwest of Johnson street, and within the corpo-
26 rate limits of the city of San Francisco, as defined by an act of the legislature of the State of California, entitled "An act to re-incorporate the city of San Francisco," passed April 15th, 1851, and is bounded and described as follows: Commencing at a stake marked "B 6" at the northwestern corner of said tract, in the willow fence which forms the southern boundary of the tract of land called "Suerte en Dolores," finally conveyed and confirmed to the heirs of Francisco Guerrero Palomares, as shown on the plat of the official survey of the tract of land in Mission Dolores finally confirmed to C. S. de Bernal et al., now on file in the office of the U. S. surveyor general in said city and county; running thence south $8\frac{1}{4}°$ east, 8.43 chains; thence north $81\frac{3}{4}°$ east, 5.19 chains; thence north 4° west, 3.99 chains; thence north 81° east, 2.95 chains; thence north $8\frac{1}{4}°$ west, 4·38 chains; and thence south $81\frac{3}{4}°$ west, 8,43 chains to the place of beginning, containing 5 86-100 acres of land.

2d. That on the 1st day of March, 1853, the plaintiffs, who were the widow and son of Jose Cornelio Bernal, then deceased, presented to the board of United States land commissioners for California their petition for the confirmation of a tract of land situate at said Mission Dolores, of which petition the following is a copy:

27 To the honorable commissioners to settle private land claims in California.

The petitioners, Carmen Sibrian de Bernal, widow, and Jose Jesus Bernal, only child of Jose Cornelio Bernal, deceased, respectfully represent:

That about the year 1834, Jose Figuerpa, governor of California, by virtue of authority in him vested, granted to the said Jose Cornelio Bernal a tract of land near the mission of San Francisco de Asis or Dolores, in the present county of San Francisco, two hundred varas square, which lot of land was immediately taken possession of by the said Bernal and improved, and has been in the possession of him (the petitioner,) his widow and only child, thenceforward to the present time.

That the said Bernal died in California, A. D. 18 , leaving the petitioners (his widow) and only child.

That the original paper-title to said lot of land was lost some time in the year 1846, when the house of the said Bernal was robbed and his papers stolen or destroyed.

That the petitioners will, on or before the hearing of this their petition by this honorable board, adduce such proofs in support of their claim as they may be advised are necessary.

Wherefore they pray the commissioners, on the final hearing of their petition, and of the evidence they may adduce in its support, to confirm to them the said tract of land.

By their attorneys,

HALLECK, PEACHY & BILLINGS.

28 Filed in office March 1st, 1853.

GEO. FISHER, *Secy*.

That such proceedings were had in said tribunal that afterwards, to wit, on the 8th day of August, 1854, the said claim was confirmed to the plaintiffs by a final decree of said land commission, of which the following is a copy:

CARMEN S. DE BERNAL *et al.*
vs.
THE UNITED STATES.

In this case, on hearing the proofs and allegations, it is adjudged by the commission that the said claim of the petitioner is valid; and it is therefore decreed that the same be confirmed.

The land of which confirmation is hereby made is a lot of two hundred varas square, situated in the county of San Francisco, and near the Mission Dolores, and the same on which Jose Cornelio Bernal formerly lived; said lot being situated sixty varas from the northwest corner of the establishment of said Mission of Dolores, and one hundred and fifty varas from the northeast corner of said establishment of Dolores to the northeast corner of said lot; the said lot lying

on the south side of an arroyo, which forms the northern boundary of said lot, and lying in a square form.

ALPHEUS FELCH,
R. AUG. THOMPSON,
S. B. FARWELL,
Commissioners.

Filed in office August 8, 1854.

GEO. FISHER, *Secretary.*

29 That thereupon the United States appealed to the District Court of the United States for the northern district of California, and such proceedings were had in said court that afterwards, to wit, on the 24th day of March, 1856, a decree was made therein confirming said claim, of which decree the following is a copy:

In the United States District Court for the northern district of California.—Stated term.

Lot in Dolores.

THE UNITED STATES, appellant,
vs.
C. S. DE BERNAL *et al.*, appellees.

March 24, 1856.

On appeal from the final decision of the board of commissioners to ascertain and settle private land claims in the State of California. This cause came on to be heard at a stated term of the Court, on appeal from the final decision of the board of commissioners to ascertain and settle the private land claims in the State of California, under an act of Congress approved on the 3d of March, A. D. 1851, upon the transcript of the proceedings and decision of the said board of commissioners, and the papers and evidence on which the said decision was founded; and it appearing to the court that the said transcript has been duly filed according to law, and counsel
30 for the respective parties having been heard, it is by the court hereby ordered, adjudged and decreed that the said decision be, and the same is hereby, in all things affirmed. And it is likewise further ordered, adjudged and decreed, that the claim of the appellees is a good and valid claim, and that the said claim be, and the same is hereby confirmed to the extent and quantity of two hundred varas square, being the same land proved to have been granted to Jose Cornelio Bernal, and of which the possession was proved to have been long enjoyed by the said Jose Cornelio Bernal, in his lifetime, and by the claimants, his widow and only child, since his death; provided that the said quantity of two hundred varas square, now confirmed to the claimants, be contained within the boundaries of the land so proved to have been granted; and if there be less than that quantity within the said boundaries, then we confirm to the claimants that less quantity.

OGDEN HOFFMAN, JR., *U. S. District Judge.*

Endorsed: Filed March 24th, 1856. John A. Monroe, clerk. By W. H. Cheevers, deputy.

That afterwards, the United States declining to prosecute an appeal from said decree, by reason whereof the said decree became final, the said District Court, on the 2d day of April, 1857, entered an order to the effect that said claimants have leave to proceed under the aforesaid decree rendered by said court, as under final decree.

31 3d. That afterwards the Surveyor General of the United States for California made an official survey of the tract of land so confirmed to the plaintiffs, and duly approved the same on the 16th day of April, 1861, and gave public notice thereof as required by law. That afterwards, to wit, on the 13th day of July, 1861, one Theodore Dehon, by his agent and attorney, Michael Lynch, one of the defendants in this action, presented his petition to said District Court of the United States, praying that said survey be returned into said court for its revision, of which petition the following is a copy:

In the District Court of the United States for the northern district of California.

UNITED STATES
vs.
CARMEN S. DE BERNAL *et al.* } No. 165.

To the Hon. Ogden Hoffman, judge of the District Court of the United States for the northern district of California:

Your petitioner, Theodore Dehon, respectfully represents, by his attorneys, Crockett & Crittenden, that he is a resident and citizen of New York, and has never been in the State of California, but is the owner of a tract of land situate at the Mission Dolores, in the city and county of San Francisco, in the State of California, the title to which your petitioner derives in part from Joseph S.

32 Allemany, the archbishop of the Roman Catholic Church for the diocese of California, to whom the said lands so conveyed have been duly patented by the government of the United States. Your petitioner further represents, that in the above-entitled cause of the United States vs. Carmen S. de Bernal et al., which is numbered 165 on the register of land causes in said court, there was fully confirmed to said claimants by a decree of said court, a tract of land two hundred varas square, at the said Mission Dolores; and that by virtue of said decree of confirmation, the United States surveyor general for California has caused a survey to be made of the lands so confirmed, which survey was on the 16th day of April, 1861, approved by said surveyor general, and his approval endorsed on the plat of said survey; and the fact of said survey having been so made and approved was first duly published by said surveyor general on the 4th day of July, 1861, under and in pursuance of the act of Congress in that behalf, approved June 14th, 1860, as appears by a copy of said notice hereto annexed:

U. S. Land Surveys.

To all whom it may concern.

U. S. SURVEYOR GENERAL'S OFFICE,
San Francisco, June 25, 1861.

In compliance with the first section of an act of Congress approved June 14th, 1860, regulating surveys of private land claims, notice is hereby given that the plats of the following private
33 land claims in the State of California, approved March 31, 1851, have been examined and approved by J. W. Mandeville, esq., late surveyor general:

Name of Rancho.	Confirmee.
Lot near Mission Dolores.	C. S. de Bernal et al.
Lot near Mission Dolores.	Heirs of F. G. Palomares.

The plats will be retained in this office, subject to inspection, for four weeks from the date of this publication.

EDWARD F. BEALE,
U. S. Surveyor General.

Your petitioner further represents that the said survey is erroneous, and does not conform either to the original grant or the said decree of confirmation, and embraces other and different land from that which was so granted and confirmed: and wrongfully includes a considerable portion of the land so patented to said Allemany, and held by your petitioner under a title derived from said Allemany, by regular mesne conveyances, down to your petitioner.

Wherefore he prays that an order be made requiring the said surveyor general to return the said survey into your honorable court, that the same may be reviewed and reformed, or set aside.

CROCKELT & CRITTENDEN,
Attorneys for Theodore Dehon.

STATE OF CALIFORNIA, *City and County of San Francisco*:

Michael Lynch, being duly sworn, deposes: That he is the
34 agent and attorney-in-fact of the above named Theodore Dehon, who resides in the city of New York, and is absent from this State, and that said Lynch has charge of the business and affairs of said Dehon in California, and that the foregoing petition is true of his own knowledge, except as to the matters therein stated on his information and belief, and as to those matters he believes it to be true.

MICHAEL LYNCH,

Subscribed and sworn to before me this 9th day of April, A. D. 1861.

[SEAL.] F. J. THIBAULT, *Notary Public.*

Endorsed: Filed July 13, 1861. W. H. Cheevers, clerk.

That thereupon, on said 13th July, 1861, the said District Court ordered said survey to be returned into said court, and the same was afterwards duly returned into said court, in obedience to said order.

4th. That the said Theodore Dehon died on or about the month of July, 1861, in the State of New York, leaving a will which was duly admitted to probate in said State; and one William Dehon was duly appointed executor of said will; that afterwards, to wit, on or about the 24th day of January, 1863, an exemplified copy of said will was duly admitted to probate by the Probate Court of the city and county of San Francisco, and the defendant, Michael Lynch, was then appointed by said court administrator with the will, annexed, of said Theodore Dehon, deceased.

35 5th. That on the 5th day of September, 1861, the said William Dehon, as executor of said Theodore Dehon, deceased, filed in said court exceptions to said survey, claiming that said survey included lands belonging to said estate of which the said Theodore Dehon had actual possession at the time of his death.

That the said William Dehon and the defendant, Michael Lynch, on behalf of said estate, employed counsel to appear before said court and contest the said survey, and said counsel did appear before said court on behalf of said estate, and object to and contest said survey; and the said exceptions to said survey were then, before said court, by said counsel fully tried and litigated; and afterwards, on the 21st day of May, 1863, the said District Court made an order modifying said survey with respect to the lines of the the church lands, but overruling all other of the said exceptions filed on behalf of said estate of Theodore Dehon, deceased; and further ordered that the surveyor general for California re-form his said survey so that it would not conflict with said church lands, and that he return a plat of such re-formed survey, without delay, for approval and confirmation.

6th. That said surveyor general did thereupon re-form and return said survey as ordered by said court; and afterwards, to wit, on the 3d day of August, 1863, the said court made its final decree in said cause, confirming to said plaintiffs the land described in said

36 plat as modified, as aforesaid, which land is the same land described in the complaint in this action.

7th. That on the 7th day of August, 1863, the said William Dehon, executor, as aforesaid, on behalf of the estate of said Theodore Dehon, deceased, applied to said court for leave to appeal from said final decree to the Supreme Court of the United States; whereupon an order was made by said court granting said appeal. And afterwards, the said matter coming on to be heard in said Supreme Court, the said decree so appealed from was by said Supreme Court in all respects affirmed, on or about the day of 186 being same case reported in 3d Wallace R., last case.

8th. That said Theodore Dehon, long prior to and down to the time of his death, as aforesaid, claimed to own said premises, and was in the possession thereof. That during the lifetime of said De-

hon, and from and after the commencement of the year 1859, the said Michael Lynch was the agent of said Dehon, and as such was in possession of said premises, and has ever since continued and is yet in the possession thereof. That ever since his appointment as administrator, with the will annexed, of said Theodore Dehon, deceased, as aforesaid, he has held possession of said premises as the property of the estate of said Dehon ever since prior to the commencement of this action continuously to the present time, and the other defendants named in the complaint were in the possession of said
37 premises at the commencement of this action, as tenants thereof under said Lynch.

That from on and before the 1st day of January, 1855, the said Theodore Dehon, and those under whom he claims, were in the actual possession of the said premises, having the same enclosed by a substantial fence, and cultivating the same; and so continued said possession and cultivation till long after the 1st day of June, 1855. That said premises are included in that portion of the city and county of San Francisco covered by the so-called Van Ness ordinance.

9th. That on the trial of the plaintiffs' aforesaid claim for confirmation, in the said land commission and said District Court, so far as the evidence remaining of record in the hands of the clerk of said court discloses, no documentary evidence of any character was offered or produced in support of the plaintiffs' said claim for confirmation; and the only evidence offered or produced, either in said land commission or said District Court, in support of said claim, were the depositions of Jose Castro and M. G. Vallejo, of which the following are copies:

UNITED STATES LAND COMMISSION,
San Francisco, February 9th, 1854.

On this day, before Commissioner Thompson Campbell, came Jose Castro, a witness in behalf of claimants Carmen S. Bernal et al., case No. 671, who, after being duly sworn, deposed as follows—his evidence being interpreted by the secretary:

38 1st question. What is your name, age, and place of residence?

Answer. My name is Jose Castro; I am forty-five years of age, and I reside in Monterey.

2d quest. State what you know in relation to the land claimed by the heirs of Jose Cornelio Bernal, the grant and occupation of the same.

Ans. In the year 1834, in the last month of the year, the wife of Bernal went to Monterey and petitioned for a solar, or lot, to Governor Figueroa. She requested me to write her petition for the said lot, as recommended by the minister of the mission, which I did, and that a lot of two hundred varas square was granted to her husband. On the margin of this petition the governor decreed that the grant should be made in conformity with the recommendation of the minister of the mission; and that the same was made in considera-

tion of the services of her husband, rendered as mayordomo of said mission for the term of fourteen or fifteen years, and the decree contained the further order that the minister of said mission should put the party in possession of the lot so granted. This decree was signed by the governor and was delivered to the wife of Jose Cornelio Bernal. About the middle of the year 1835 I was at the said mission of Dolores, at which time they had on it a wooden house and a foundation for an adobe house. Bernal and his wife were at that time living in the wooden house Said solar, or lot, is situated sixty varas, more or less, from the northwest corner of the establishment of the mission of Dolores, and one hundred and fifty varas, 39 more or less, from the northeast corner of said establishment of Dolores, to the northeast corner of said solar; the said solar lying on the south side of an arrayo, which forms the northern boundary of said solar.

Questions by the Associate Law Agent.

1st question. Do you recollect whether the grant to which you have referred was a grant in full property, or whether it was merely provisional?

Answer. The title conveyed by the concession to which I have referred was a title in full property.

JOSE CASTRO.

Sworn to and subscribed before me this 9th day of February, A. D. 1854.

THOMAS CAMPBELL,
Commissioner.

Filed in office February 9th, 1854.

GEO. FISHER, *Secretary.*

UNITED STATES LAND COMMISSION,
San Francisco, February 9th, 1854.

On this day, before Commissioner Thompson Campbell, came M. G. Vallejo, a witness on behalf of claimants, Carmen S. de Bernal, et al., case No. 671, who, after being duly sworn, deposes as follows, his evidence being interpreted by the secretary:

40 1st question. What is your name, age, and place of residence?

Answer. My name is M. G. Vallejo. I am forty-six years of age, and I reside in the city of Sonoma.

2d question. State, if you please, what you know in regard to the situation and occupation of a certain solar or lot located in the Mission Dolores, and claimed by the heirs of Jose Cornelio Bernal.

Answer. I know that a grant for a solar in the [in the] Mission Dolores was made by Governor Figueroa to Jose Cornelio Bernal, in the year 1834. The solar granted, as above stated, is situated in a northwest direction from the old church of said mission, and close by an arrayo, which forms the north boundary of said solar. The

consideration of said grant was a debt due Bernal by the said Mission Dolores, for services which Bernal had rendered in the capacity of mayordomo. In the year 1835 they commenced the foundation of an adobe house, before I went to Sonoma.

Associate law agent present.

M. G. VALLEJO.

Sworn to and subscribed before me this 9th day of February, A. D, 1854.

THOMAS CAMPBELL,
Commissioner.

Filed in office February 9th, 1854.

GEO. FISHER,
Secretary.

9½. That in fact the aforesaid claim of the plaintiffs for confirmation was without any valid foundation in law or equity, and no grant for said lands ever issued to said Jose Cornelio Bernal, as alleged by the plaintiffs in their said petition for confirmation, so far as shown by the evidence remaining on record in the United States District Court, which was the only evidence of a grant which was offered on the trial of this action, exclusive of the decree of confirmation.

41 10th. That the defendant, Michael Lynch, has received from the undivided one-half of the premises hereinbefore described rents and profits to the amount of five hundred dollars.

And as conclusions of law, from the facts aforesaid, the court finds:

1st. That the defendants are estopped, by the plaintiff's final decree of confirmation and final approved official survey, from denying or questioning the plaintiffs' title to the land and premises described in the complaint.

2d. That the defendants are estopped by the proceedings in said District and Supreme Courts from again litigating the correctness of said survey and the location of the lands included in said decree of confirmation.

3d. That the plaintiffs are entitled to judgment against all the defendants for the possession of the land and premises described in the complaint, and for $500 damages, for the use and occupation thereof, againt the defendant, Lynch.

E. D. SAWYER,
District Judge.

Endorsed: Filed Aug. 22, 1867. Wm. Loewy, clerk. Per Jas. E. Ashcom, D. C.

42 District Court of the fourth judicial district in and for the city and county of San Francisco, State of California.

CARMEN S. DE BERNAL *et al.*
vs.
MICHAEL LYNCH *et als.*

Amended findings.

The defendants in this cause having in due time duly accepted to the findings of fact and conclusions of law heretofore filed therein, and the said exceptions having been duly considered, it is hereby ordered, adjudged and decreed that said findings be, and the same are hereby amended, by adding thereto an additional finding of fact, as follows, to wit:

That the premises in controversy were duly assessed to the estate of Theodore Dehon for State, city and county taxes for the fiscal year 1865–'6; that said taxes remained unpaid and were delinquent; and whilst so unpaid and delinquent, portions of said premises, included within the boundaries hereinafter described, were sold by the tax collector of the said city and county for said delinquent taxes, and at said sale were struck off to Isaac N. Thorne, the highest and best bidder therefor, for the amount of said delinquent taxes; that the premises so sold were not redeemed from said tax sale within the period allowed by law for such redemption; and after the time
43 of such redemption had expired, the said tax collector executed three deeds, bearing date January 22d, 1867, purporting to convey said portions of said premises to said Thorne, viz:

1st. Commencing on the southwest corner of Church and Sixteenth streets; thence running 299 feet south on Church street to Necropolis avenue; thence southwest 567 feet on the line of Necropolis avenue to Sanchez street; thence north 373 feet to Sixteenth street; thence at right angles east 560 feet to the point of beginning.

2d. Commencing on the northeast corner of Sixteenth and Church streets; thence running 290 feet east on Sixteenth street; thence at a right angle north 90 feet 10 inches; thence at a right angle west 5 feet; thence at a right angle north 36 feet 7 inches; thence at a right angle east 5 feet; thence at a right angle north 80 feet; thence at a right angle west 5 feet; thence at a right north 39 feet 8 5-7 inches; thence at a right angle east 5 feet; thence at a right angle north 119 feet 2 1-7 inches; thence at a right angle west 290 feet; and thence at a right angle south 365 feet and 10 inches to the place of beginning.

3d. Commencing on the northwest corner of Church and Sixteenth streets; thence southwest 566 feet and nine inches, more or less, to Sanchez street; thence south 307 feet, more or less, to Sixteenth street; thence at a right angle east 560 feet to the point of beginning.

44 And the court further finds that said purchase and convey-

ance, though made in the name of said Thorne, and ostensibly for his use, were in fact made for the use and benefit of the defendant Lynch, as administrator of Theodore Dehon, deceased; and at the request of said Lynch, and with money furnished him for that purpose, the said tax deeds were delivered by said tax collector to said Lynch, and were never at any time delivered to said Thorne.

And the court further finds that whatever title or right to the premises so sold vested in said Thorne by virtue of said deeds, he, said Thorne, holds the same in secret trust for said Lynch, as administrator as aforesaid.

And, as a conclusion of law, the court finds that said tax deeds are not operative as an outstanding title to defeat the plaintiffs' recovery.

October 2d, 1867.

E. D. SAWYER, *District Judge.*

Endorsed: Filed Oct. 2d, 1867. William Loewy, clerk; per Jas. E. Ashcom, D. C.

45 In the District Court of the fourth judicial district of the State of California, in and for the city and county of San Francisco.

Judgment.

CARMEN S. DE BERNAL and JOSE DE JESUS BERNAL
vs.
MICHAEL LYNCH, LEOPOLD GREGET, ANDRE BERGEROTS, Isadore Bernamayous, Ebenezer Morrell and Louis Hamel. } No. 10784.

This cause came on regularly for trial, Mr. Barstow appearing as counsel for the plaintiffs, and Mr. Crockett for the defendants. A trial by jury having been expressly waived by the counsel for the respective parties, the cause was tried before the court sitting without a jury. Whereupon witnesses on the part of plaintiffs were duly sworn and examined; and certain documentary evidence having been read on the part of the plaintiffs, and the evidence being closed, the cause was submitted to the court for consideration and decision, and after due deliberation thereon the court delivers its finding and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and finding aforesaid, it is ordered, adjudged and decreed that Carmen S. de Bernal and
46 Jose De Jesus Bernal, plaintiffs, do have and recover of and from Michael Lynch, Leopold Greget, Andre Bergerots, Isadore Bernamayous, Ebenezer Morrell and Louis Hamel, defendants, the possession of all that certain tract of land situate, lying and being in the city and county of San Francisco, adjoining the mission church property at the Mission Dolores, (so-called,) and bounded and described as follows, viz: Commencing at a stake marked B 6, at the

northwestern corner of said tract, in the willow fence which forms the southern boundary of the tract of land called "Suerte en Dolores," finally surveyed and confirmed to the heirs of Francisco Guerrero Palomares, as shown on the plat of the official survey of tract of land in Mission Dolores, finally confirmed to C. S. De Bernal et al., now on file in the office of the U. S. surveyor-general in said city and county; running thence south 81¼°, E. 8.43 chains; thence north 81¾°, east 5.19 chains; thence north 4°. west 3.99 chains; thence north 81°, east 2.95 chains; thence north 8¼°, west 4.38 chains to the northeast corner of said tract, at the junction of a ditch or stream with the southern boundary of said "Suerte en Dolores;" and thence on said southern boundary, south 81¾°, W. 8.43 chains, to the place of beginning; containing five 86-100 acres of land.

And it is further ordered and adjudged that said plaintiff recover of said defendant, Michael Lynch, five hundred dollars, ($500,) and from all of said defendants said plaintiffs' costs and disbursements incurred in this action, amounting to the sum of thirty-three
47 and 05-100 dollars, ($33 05.)

Judgment recorded October 22d, A. D. 1867.

Distr ct Court of the fourth judicial district, city and county of San Francisco.

Statement on motion for new trial.

CARMEN S. DE BERNAL *et al.*
vs.
MICHAEL LYNCH *et als.*

On the trial of this cause the defendants, to show an outstanding title in one Isaac N. Thorne, put in evidence certain tax deeds, of which the following are copies:

Tax deeds.

1865–66.—No. 510. M. block 96; page 176. Sub. 1.—Conveyance of real estate sold for non-payment of State and city and county taxes for the fiscal year 165–66.

This indenture, made and entered into this twenty-second day of January, in the year of our Lord one thousand eight hundred and sixty-seven, (A. D. 1867,) between Charles R. Story, tax collector of the city and county of San Francisco, State of California, party hereto of the first part, and Isaac N. Thorne, of the same place, party hereto of the second part, witnesseth:

48 That whereas Charles R. Story, heretofore and at the time of the levy, publication and sale hereinafter spoken of, tax collector of the city and county of San Francisco, by virtue of and in conformity with an act of the legislature of the State of California, entitled "An act to provide revenue for the support of the government of this State," approved April 29th, 1857, and the several acts

amendatory thereof and supplementary thereto, as well as the other statutes and laws of the State of California applicable, did, on the third Monday in October, 1865, levy upon the property of which description is first hereinafter given in this deed for taxes due to the State of California, and to the city and county of San Francisco, together with the costs and charges due thereon; that said property was assessed for the fiscal year ending June 30th, 1866, at three thousand seven hundred and fifty dollars, to estate of T. Dehon and to all owners and claimants, known or unknown, and to all owners and claimants of any interest, present or future therein, or any lien upon the same, and that the same was liable and subject to taxation; that said taxes were levied upon it according to law; that said taxes were not and had not been paid, and at the time of the sale hereinafter spoken of still remained due and unpaid.

That publication of the intention to sell for the taxes was made as provided by law: That in said publication or original advertisement, which was entitled "Delinquent tax list for 1865-66,"
49 was given the names of the owners, when known, of all the real estate, together with such a condensed description of the property that it might easily be known; and also a similar condensed description of any real estate assessed to unknown owners; and also the name of every party delinquent for any tax on personal property; and also, opposite each name or description, was given the amount of taxes, including the costs and charges, as provided by law, due from each delinquent person or property. That said publication was made by one insertion one time per week for three successive weeks in a supplement to the Daily Evening Bulletin, a public newspaper published in the city and county of San Francisco. That said insertions were made and published, one on the 25th day of November, A. D. 1865; one on the 2d day of December, A. D. 1865; one on the 9th day of December, A. D. 1865. That said publication did designate the time and place of commencing the sale, which time)to wit, between the hours of ten o'clock a. m. and three o'clock p. m. of Monday, December 18th, A. D. 1865) was not less than twenty-one days, nor more than twenty-eight days from the first appearance of the said publication, and the place so designated was in front of the city and county court-house in said city and county. That in conformity to and in pursuance of a certain "order," made on the 26th day of December, A. D. 1865, by virtue of an act entitled "An act concerning assessment rolls and other official proceedings to
50 raise revenue for the support of the government of this State, and to provide for the amendment of omissions, errors and defects therein," approved December 23d, A. D. 1865, said order having been made by the officers and in the manner in said act designated, a supplementary advertisement, explanatory of the said original advertisement, together with said order, were published one week prior to January 8th, A. D. 1866, in the Daily Evening Bulletin, the newspaper in said order designated. That for the purposes of such supplementary advertisement, and in conformity to said order, the commencement of the tax sale of property originally in said "delin-

quent tax list" advertised, was postponed to Monday, January 8th, A. D. 1866, between the hours of ten o'clock a. m. and three o'clock p. m. That notice of such postponement was in said supplementary advertisement given. That such sale was commenced between the hours of ten o'clock a. m. and three o'clock p. m. on Monday, January 8th, A. D. 1866.

That the property assessed, levied upon and advertised, situate, lying and being within the city and county of San Francisco, and described thus:

The lot of land commencing on the northwest corner of Church and Sixteenth streets; thence running three hundred and thirty-eight feet north on Church street; thence southwest five hundred and sixty-six feet and nine inches, more or less, to Sanchez street; thence south three hundred and seven feet, more or less, to Sixteenth
51 street; thence at right angles east five hundred and sixty feet, to the place of beginning, was by the said Charles R. Story, tax collector of the city and county of San Francisco, on the eleventh (11th) day of January, A. D. 1866, in accordance with law, offered at public auction, in front of the city and county court-house, in said city and county, and that at said auction Isaac A. Thorne was the bidder who was willing to take the least quantity or smallest portion of the said land and pay the [the] taxes, costs and charges thereon, (including two dollars for the certificate of sale,) which taxes, costs, charges and certificate, amounted to one hundred and twenty-five 35-100 dollars.

That the said least quantity or smallest portion of the said land as is hereinafter described, to wit: The entire lot of land hereinbefore described, was by the said Charles R. Story, tax collector, as aforesaid, struck off to him, the said Isaac N. Thorne, who paid the full amount of the said taxes, costs and charges thereon, (including two dollars for the said certificate of sale,) and thereupon became the purchaser of the last described piece or parcel of land; and whereas no person has redeemed the property aforesaid during the time allowed by law for its redemption: Now, therefore, this indenture witnesseth, that I, Charles R. Story, tax collector as aforesaid, by virtue and in pursuance of the statutes in such cases made and provided, for and in consideration of the sum of one hundred
52 and twenty-five 35-100 dollars, to me in hand paid, the receipt of which is hereby acknowledged, has granted, bargained, sold, conveyed and confirmed, and by these presents do grant, bargain, sell, convey and confirm unto the aforesaid Isaac N. Thorne, and to his heirs and assigns forever, all that lot, piece or parcel of land hereinbefore and last described in this deed, as fully and absolutely as I, Charles R. Story, tax collector, as aforesaid, may or can lawfully sell and convey the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, as well in law as in equity, of the said estate of T. Dehon, and of all owners or claimants thereof, known or unknown, and of all owners and claimants

of any interest, present or future therein, or any lien upon, in, or to the said last above described premises, and every part and parcel thereof, with the appurtenances, or which he or they had possessed on the day of said levy or assessment.

To have and to hold, all and singular the hereinbefore and last mentioned and described premises, together with the appurtenances thereof, unto Isaac N. Thorne, the said party of the second part, and his heirs and assigns forever.

In witness whereof I have hereunto set my hand and seal,
53 in the city and county aforesaid, the day and year first hereinbefore written.

CHARLES R. STORY,
Tax Collector of the City and County of San Francisco.

Witness:
JOHN HANNA.

[50-cent. int. rev. stamp, cancelled.]

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On the twenty-second day of January, A. D. 1867, one thousand eight hundred and sixty-seven, before me, Otis V. Sawyer, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared the within-named Charles R. Story, known to me to be the tax collector of said city and county, whose name is subscribed to the annexed instrument as a party thereto, he being personally known to me to be the individual described in and who executed the foregoing instrument, and subscribed his name thereto as tax collector, and he duly acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my official seal, at my office in the city and county of San Francisco, the day and year last above written.

[SEAL.] OTIS V. SAWYER,
Notary Public.

54 Having first proved that the said deeds were duly executed by the said tax collector of said city and county, at the dates thereof, to the admissibility of which deeds in evidence the plaintiffs objected, on the ground that it appeared on the face of said deeds that they were irregular and void; but the court overruled the objection, and admitted said deeds in evidence, to which ruling the plaintiffs duly excepted.

The plaintiffs then called the said Isaac N. Thorne as a witness, who testified that he has been in the habit for several years of attending tax sales in this city and county, and bidding off a large number of lots sold for taxes; that he does not remember to have bid off

the particular lots described in said tax deeds, but presumes he did so bid it off; that he does not remember to have obtained the certificates of purchase, nor who furnished the purchase money, if any one; that he frequently represented other persons in such purchases, but don't recollect whether he purchased this property for others than himself; and that he never saw the tax deeds until they were exhibited to him in court, and has no recollection of ever seeing the certificates; that he furnished no money for the purchases.

The defendant Lynch was present in court, and was not put on the witness stand.

John Hanna, a witness called by the plaintiffs, testified that he is a clerk in the tax collector's office, and drafted the tax deeds put in evidence, at the request of the defendant, Lynch, and when
55 signed, delivered the deeds to Lynch, and at the same time Lynch surrendered the certificate of purchase. The lots described in the deeds were struck off to Thorne at the time specified in the deeds.

This was all the evidence in the cause in respect to the said tax deeds.

And thereupon the defendants move the court to set aside the findings and judgment, and to grant a new trial on the following grounds:

1st. That the evidence was insufficient to support the findings in respect to said tax deeds, in this, to wit: That it does not appear from the evidence that the premises described in the said tax deeds were purchased by said Thorne at said tax sale, for the use and benefit of, or with the money of the defendants, or either of them; nor that the title so acquired by Thorne by said tax sale and deeds was or is held by him in trust for the defendants, or either of them.

2d. That the findings and judgment are against law, are erroneous, and not supported by the facts found.

3d. That on the findings of fact, the judgment should have been for the defendants.

J. B. CROCKETT,
Attorney for Defendants.

56 The foregoing statement is settled and agreed to as correct.

J. B. CROCKETT,
Attorney for Defendants.
D. P. BARSTOW,
Attorney for Plaintiffs.

District Court of the fourth judicial district in and for the city and county of San Francisco.

Stipulation.

C. S. DE BERNAL *et al.*
vs.
MICHAEL LYNCH *et als.*

It is hereby stipulated and agreed that within the proper time the defendants duly served and filed a notice of their intention to move

for a new trial in the above-entitled cause, on the grounds specified in the statement on motion for new trial; that said statement was duly filed within the proper time; that said motion for a new trial was denied by the court within ten days last past, to wit, on the 26th day of October, 1867, and that the defendants duly served and filed a notice of appeal, as well from the original judgment as from the said order denying said motion for new trial, and that said defendants have within the proper time given and filed a sufficient undertaking on appeal.

J. B. CROCKETT,
Attorney for Defendants.
D. P. BARSTOW,
Attorney for Plaintiffs.

It is agreed that the foregoing forty-three pages shall constitute the transcript on appeal in the above-entitled cause.

J. B. CROCKETT,
For Appl't.
D. P. BARSTOW,
For Respondents.

31st Dec'r, 1867.

57 *Opinion of the court.*

BERNAL *vs.* LYNCH. } No. 1565.

The plaintiffs are the widow and son of Jose Cornelio Bernal. Their claim to the premises, which they derived under an alleged grant from Governor Figueroa to Jose Cornelio Bernal, was confirmed by the District Court, and the survey of the lands granted was finally confirmed by the District Court in 1863. Theodore Dehon, under whom the defendants claim, contested the survey, and his executor appealed to the Supreme Court; and in that court the decree of the District Court was affirmed. The defendants rely upon title in the estate of Dehon under the Van Ness ordinance, the premises being within the corporate limits of the city of San Francisco, as defined by the act of April 15, 1851.

The petition for confirmation of the claim being sufficient to give the board of commissioners jurisdiction of the claim, the decree of the District Court, on appeal from the decision of the board of commissioners, is not subject to a collateral attack from any quarter. The rule is well stated by Mr. Justice Field in Beard *vs.* Federy, (3 Wal., 489:) "The board having acquired jurisdiction, the validity of the claim presented, and whether it was entitled to confirmation, were matters for it to determine, and its decision, however erroneous, cannot be collaterally assailed on the ground that it was rendered on insufficient evidence. The rule which applies to the judgments of other inferior tribunals applies here—that where it has once acquired jurisdiction its subsequent proceedings cannot be collaterally questioned for mere error or irregularity." This question was considered in Semple *vs.* Hager, (27 Cal., 16, 3,) and the decision accords with the conclusion now announced.

The decree confirming the survey was an adjudication that the lands mentioned in the decree confirming the claim were properly located and correctly surveyed. Dehon having made himself a party to the proceedings for the confirmation of the survey, neither he nor those claiming under him will be permitted to question the decree. (Treadway *vs.* Semple, 28 Cal., 652; Semple *vs.* Wright, 23 Cal., 659.)

The act of Congress of June 14, 1860, provides that "the said plat and survey, so finally determined by publication, order or decree, as the case may be, shall have the same effect and validity in law as if the land so surveyed had been issued by the United States." The title thus established is sufficient to enable the plaintiffs to maintain the action. To overthrow this title the defendants allege that the title was in the city, and claim that it passed from the city to Dehon, under the operation of the Van Ness ordinance, and by virtue of the act of Congress of 1864. They claim that the title of the pueblo and of the city, as its successor, was a perfect title; and that if not a perfect title, yet it was such a title that the city and her grantors were such "third persons" as are mentioned in the act of Congress of March 3, 1851, who are not affected by the patent of the United States, and, consequently, not by the decree of confirmation of the claim, or the confirmed survey upon which the patent is to be issued. And they claim the right to attack the decree of confirmation and the survey, on the ground that the act of 1864 excepts from the operation of the act only the bona fide claims of others.

It may be conceded that all the title the city held passed to Dehon by virtue of the Van Ness ordinance; but the defendants are not assisted by the act of Congress of 1864. For, if the act was sufficient to transfer the legal title, it did not have that effect, because it was subsequent to the confirmation of the survey, which is declared by the act of 1860 to be equivalent to a patent issued by the United States. If the title was ever in the United States, it passed to the plaintiffs before the passage of the act of 1864. The proviso to the fifth section declares "that the relinquishment and grant by the act shall in no manner interfere with or prejudice any bona fide claim of others, whether asserted adversely under rights derived from Spain, Mexico or the laws of the United States, nor preclude a judicial examination or adjustment thereof." The Bernal claim is clearly within the proviso. But the defendant's counsel says that the bona fides of the claim is the vital matter in issue here. The position may be admitted, but in answer to the argument of counsel, it must be added that the bona fides of the claim conclusively appears from the decree of confirmation of the claim. The question was necessarily involved in the proceedings for confirmation. The good faith of the claim is an essential element of its validity, and its validity is conclusively established by the decree of confirmation. It could scarcely be credited that it was the intent of the act of 1864, entitled "An act to expedite the settlement of titles to lands in the State of California," to impair or destroy the decrees in all the proceedings had during the preceding

twelve years for the settlement of private land claims within the limits of the city of San Francisco.

The principle, if not the only purpose, for which a litigant establishes the fact that he is a "third person" within the meaning of the act of 1851, is to enable him to produce a better title than that which is shown on the other side. We deem it unnecessary to argue the question whether the city possesses a perfect title to the pueblo lands; for it is not pretended that the four leagues, or any other amount of land was set off to the pueblo. It is clear, both upon principle and authority, that the title is not deemed perfect until the lands are segregated from the public domain. (Estrada *vs.* Murphy, 19 Cal., 248; Thornton *vs.* Mahoney, 24 Cal., 579; Seal *vs.* Ford, 29 Cal., 117; Thornton *vs.* Mahoney, 30 Cal., 498; Stevenson *vs.* Bennett, 34 Cal., ; Fremont *vs.* United States, 17 How., 558; United States *vs.* Fossat, 20 How., 426.)

It does not necessarily follow that because the inchoate title of the pueblo was older than that of Bernal, it was the better title. The governor, in repeated instances, granted parcels of land within the limits of most, if not all, the pueblos in California; and many of those grants have been upheld and confirmed by the courts of the United States. What was the source or extent of the governor's power in this respect, or whether the pueblo lands were withdrawn from his control, or remained subject to his disposal as well as that of the pueblo authorities, are questions of great importance and interest, but their solution is not essential to the proper disposition of this case. The exercise of the power by the governor to grant lands within the pueblos has been so long acquiesced in, and so many titles depend upon a recognition of the power that it ought not now to be drawn in question, except upon the most cogent considerations. Counsel does not directly deny such authority in the governor, but only indirectly, and by insisting that the pueblo held a perfect title. The decree of confirmation of the title of the city recognizes these grants by excepting them from the operations of the decree; and in confirmation of this particular grant, the court affirmed the power under which it was made. The result is, that the title which the defendants as "third persons" set up, the title derived from the city, is not superior to that which the plantiffs acquired by the confirmation of their claim and the approved survey.

The purchase of the property at a sale for taxes by the agent of the administrator of Dehon, while he or his tenants were in possession, did not pass, or otherwise affect the title to the property. (Kelsey *vs.* Abbott, 13 Cal., 609; Moss *vs.* Shear, 25 Cal., 38; McMinn *vs.* Whelan, 27 Cal., 318; Coppinger *vs.* Rice, 33 Cal.)

Judgment affirmed.

We concur:

RHODES, J.
SANDERSON, J.
SPRAGUE, J.

I concur in the judgment:

SAWYER, *C.* J.

Mr. Justice Crockett, being disqualified, did not sit in the case.

58 In the Supreme Court of the State of California, July term, A. D. 1868.

Judgment.

C. S. DE BERNAL *et al.*, respd'ts,
vs.
MICHAEL LYNCH *et al.*, appl'ts.

On appeal from the District Court of the fourth judicial district, in and for the city and county of San Francisco.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood and fully considered, the opinion of the court herein is delivered by Rhodes, js., Sawyer, c. j., Sanderson & Sprague, js., concurring, to the effect that the judgment of the court below be affirmed.

Whereupon it is now considered, ordered, adjudged and decreed by the court here, that the judgment of the District Court of the fourth judicial district, in and for the city and county of San Francisco, in the above entitled cause, be and the same is hereby affirmed with costs.

59 In the Supreme Court of the State of California.

C. S. DE BERNAL *et al.*, respd'ts,
vs.
MICHAEL LYNCH *et al.*, appl'ts.

I, George Seckel, clerk of the Supreme Court of State of California, do hereby certify that the foregoing contains the original writ of error to the Supreme Court of the United States, a copy whereof has been lodged in my office in pursuance of the statute in such case made and provided for the defendants in error, the original bond in error duly approved by the Hon. Stephen J. Field, associate justice of the Supreme Court of the United States, copies of the original transcript on appeal to this court, the opinion of the court, and the judgment rendered thereon.

Witness my hand and the seal of the court affixed at my
60 office, this 26th day of September, A. D. 1868.

[SEAL.] GEO. SECKEL,
Clerk of the Supreme Court of the State of California.

Supreme Court of the United States.

DECEMBER TERM, 1869.—No. 106.

MICHAEL LYNCH, et al., Plaintiffs in Error,

vs.

CARMEN S. BERNAL, et al., Defendants in Error.

IN ERROR TO THE SUPREME COURT OF CALIFORNIA.

BRIEF OF PLAINTIFFS IN ERROR.

J. HUBLEY ASHTON,
Of Counsel.

M'GILL & WITHEROW, PRINTERS, WASHINGTON, D. C.

In the Supreme Court of the United States.

DECEMBER TERM, 1869.

MICHAEL LYNCH *et al.*, plaintiffs in error,
vs.
CARMEN S. BERNAL *et al.*, defendants in error.
} No. 106.

IN ERROR TO THE SUPREME COURT OF CALIFORNIA.

STATEMENT AND ARGUMENT FOR PLAINTIFFS IN ERROR.

STATEMENT.

This was an action of ejectment, instituted in the district court in and for the city of San Francisco by C. S. De Bernal and J. De J. Bernal, the defendants in error, against Michael Lynch and others, the plaintiffs in error, to recover the possession of a tract of land situated within the corporate limits of San Francisco, as defined by the charter of 1851.

The plaintiffs in that action, who are the defendants here, asserted title to the property under a final decree of the district court of the United States, entered March 24, 1856, confirming their claim to a tract of land near the Mission Dolores, in the city of San Francisco, by virtue of an alleged title derived from the Mexican Government, and under a final survey of the said claim, locating the same upon the demanded premises.

No patent has ever issued to the plaintiffs upon that confirmation and survey.

The defendants were in actual possession of the premises by inclosure and cultivation on and long prior to the 1st of January, 1855, and such possession continued until long after June, 1855, and indeed down to the present time.

The premises being within the corporate limits of the city, as defined by the charter of 1851, the defendants asserted title thereto under the second section of "The *Van Ness ordinance*," passed June 20, 1855, and ratified and confirmed by the Legislature of California on March 11, 1858, relinquishing and granting all the right and claim of the city of San Francisco to the lands within her corporate limits to the parties in the actual and continuous possession thereof on or before the 1st day of January, 1855, up to the time of the introduction of the ordinance in the common council, (June 1, 1855;) under the final decree of the circuit court of the United States, of May 18, 1865, in "*The Pueblo Case*," confirming the claim of the city to four square leagues of land in the county of San Francisco; under the 5th section of the act of Congress, passed July 1, 1864, granting to the city all the right and title of the United States to the lands within her corporate limits of 1851, for the uses specified in "*The Van Ness ordinance;*" and under the act of Congress passed March 8, 1866, confirming the claim of the city to the land embraced by the decree in "*The Pueblo Case*," and relinquishing and granting to the city all the right and title of the United States to the land situated within her corporate limits and confirmed by the decree of the circuit court.

The case was tried without a jury, and the court found certain facts which are contained in the record, (pp. 10 to 18;) and among them are these:

1. That the defendants, and those under whom they claim, are and had been in possession of the land as above stated.

2. That they had contested the said survey in the district court and the Supreme Court of the United States before the rendition of the decree of the circuit court in "*The Pueblo Case*," and before the passage of the two statutes of July 1, 1864, and March 8, 1866; and that they had not succeeded in

such contestation on account of their failure to exhibit a title to said premises.

3. That the claim of the plaintiffs, which was presented to, and confirmed by, the land board, and afterwards confirmed by the district court, was without any valid foundation in law or equity; and no grant for the lands claimed by them ever issued to Jose Cornelio Bernal, as alleged by the plaintiffs in their petition for confirmation, so far as shown by the evidence remaining on record in the United States district court, that being the only evidence of a grant offered on the trial of the action, exclusive of the decree of confirmation.

As conclusions of law the court found:

1. That the defendants were estopped by the plaintiffs' final decree of confirmation and final approved official survey from denying or questioning the plaintiffs' *title* to the land in controversy.

2. That the defendants were estopped by the proceedings in the District and Supreme Courts of the United States from again litigating the correctness of the *survey and location* of the land included in the decree of confirmation; and

3. That the plaintiffs were entitled to judgment for the possession of the premises.

Judgment was thereupon entered against the defendants for the possession of the premises, (record, p. 20;) and this judgment having been affirmed by the Supreme Court of the State, it is brought here for review under the 25th section of the judiciary act of 1789.

A more specific presentation of the respective titles here in controversy will assist us in eliminating and discussing the legal questions raised by this record.

PLAINTIFF'S TITLE.

1. Basis of it was an alleged grant to Jose Cornelio Bernal, by Governor Figuerora, of a two hundred-vara lot, in San Francisco, "about the year 1834." (Rec., p. 11.)

2. Plaintiff's petition for confirmation was presented to the land board on *March* 1, 1853; on August 8, 1854, claim was

confirmed by the board; and on March 24, 1856, it was confirmed finally by district court. (Rec., pp. 10, 12.)

3. The first survey under this decree, made April 16, 1861, embraced the demanded premises, together with other property to which Theodore Dehon, under whom defendants claim, asserted ownership under deed from Archbishop Allemany. On August 3, 1863, the court modified the survey so as to exclude the property derived from Bishop Allemany, but confirmed it as respects the premises now in controversy.

On August 7, 1863, the defendants appealed to this court from the decree thus made in regard to the survey; but this court affirmed the decree. (3 Wall, 774.) *This final decree on the survey and appeal therefrom to this court occurred, therefore, before the confirmation of the city's title to the "pueblo lands" by the circuit court,* (May 18, 1865,) *and before the date of the two statutes of* 1864 *and* 1866 *relinquishing the title of the government.* And therefore that decree and this legislation, which are the muniments of the defendant's title to this land, could not be produced in the district court and made part of the record in the survey case.

DEFENDANTS' TITLE.

1. The proprietary rights of the pueblo of San Francisco in the lands contiguous to and adjoining the town, under the laws of Mexico, as explained by Mr. Justice FIELD in his opinion in the case of City of San Francisco v. United States. (Dwinelle's Colonial History of San Francisco, Add., p. 224.)

2. Petition of the city of San Francisco, filed July 2, 1852, before the land board, for confirmation of her claim, as the successor of the pueblo, to four square leagues of land embracing the site of the city. (Dwinelle, Add., p. 119.)

3. Decree of the circuit court of California, entered May 18, 1865, confirming the said claim of the city to a tract containing an area of four square leagues, situated within the county of San Francisco, (Dwinelle, p. 250,) which tract includes the premises now in controversy. This confirmation

was in trust for the benefit of the lot-holders under grants from the pueblo, town, or city of San Francisco. (See decree.)

4. The act of March 8, 1866, expressly confirming the claim of the city to the land embraced by the decree of the circuit court, and relinquishing to the city the title of the United States to all the land situated within her then corporate limits, and confirmed to the city by the said decree. (14 Statutes at Large, p. 4.)

5. The previous act of July 1, 1864, section 5, granting to San Francisco the title of the United States to all lands within the corporate limits of 1851, embracing the premises now in question, for the uses specified in "The Van Ness ordinance" of June 20, 1855. (13 Statutes at Large, 232.)

6. And, lastly, the conveyance to the defendants, effected by the "Van Ness ordinance," of the title of the city to the particular premises now in controversy. (Dwinelle, Add., 277.)

We thus disclose, on the part of the defendants, a final confirmation of a claim of the city of San Francisco to four square leagues of land, embracing the site of the city, in virtue of a title derived from Mexico; a complete segregation of the quantity within the corporate limits of the municipality by operation of the statutes of 1864 and 1866; and, finally, a distinct segregation and location by the Van Ness ordinance of the particular premises to which the defendants are entitled under the confirmation of the city's title.

ARGUMENT.

First.

That the effect and operation of the decree of the circuit court, in the "Pueblo case," and the statute of March 8, 1866, were to vest the municipality of San Francisco with an absolute and indefeasible legal title to the lands within her corporate limits, and that the decree and the statute constitute record evidence of the action and judgment of the Government with respect to her title to those lands existing at the time of the cession of California, are propositions which we

suppose to be conclusively settled and determined by the adjudications of this court in the cases of Grisar *vs.* McDowell, (6 Wallace, 369,) and Townsend *vs.* Greeley, (5 Wall., 332.)

1. "It must be conceded," said Mr. Justice Field, speaking for the court in Grisar *vs.* McDowell, "that the pueblo which thus existed possessed some claim, legal or equitable, to, or some interest in lands within the limits of four square leagues, to be measured off from the northern portion of the peninsula upon which the city of San Francisco is situated, and that the city has succeeded to such claim or interest. This has been held by the supreme court of the State, after the most elaborate and extended consideration.

"But what is of more consequence, and *is conclusive upon this court*, it has been so adjudged by the circuit court of the United States, and that adjudication has been made *final*, as we shall hereafter see, by the legislation of Congress and the dismissal of the appeal to this court which followed.

"It is not pretended that any assignment of lands was ever made to the pueblo of San Francisco under the former government. This claim or right to any lands being therefore an imperfect one, required the *recognition and action of the new government before it could be turned into an absolute and indefeasible estate.*

"The claim of the city had, therefore, as the law then stood, to undergo judicial investigation before the board of land commissioners erected under the act of March 3, 1851, and to depend for its validity and extent upon the determination of the board, and of the tribunals of the United States to which it should be carried. The authorities of the city so regarded the claim, and by their direction it was presented to the board in July, 1852. [The learned judge proceeds to trace the history of the litigation in the courts of the United States, and states that by the action of Congress in passing the act of March 8, 1866, the decree became, with some modifications, final, and then proceeds:]

"By this act (of 1866) the government has expressed its *precise will* with respect to the claim of the city of San Fran-

cisco to her lands, as it was then recognized by the circuit court of the United States.

"The act of March 3, 1851, is a general act, applying to all cases; but the act of March 8, 1866, referring specially to the confirmation of the claim to lands in San Francisco, withdrew that claim from the further consideration of the courts under the provisions of the general act. It disposed of the city claim, and determined the conditions upon which it should be recognized and confirmed. *The title of the city, therefore, rests upon the decree of the circuit court, as modified by the act of Congress.* * * * Whoever obtained conveyances from the city, or asserted title under the Van Ness ordinance, whilst the claim of the city to the land thus conveyed, or to which the title was thus asserted was pending before the tribunals of the United States, necessarily took whatever they acquired subject to the final determination of the claim.

"Their title stood or fell with the claim, for the decree took effect by relation as of the day when the petition of the city was presented to the land board. It is to be treated in legal effect as if entered on that day."

The same learned judge delivered the opinion of the court in Townsend *vs.* Greeley, (5 Wallace, 332,) and there also the title of the city and of her grantees, under the Van Ness ordinance, is sustained as an absolute legal estate, in virtue of the decree of the circuit court and the statute of March 8, 1866. The plaintiff in that case claimed, like the defendants here, to be owners in fee simple of certain premises within the corporate limits, by virtue of the Van Ness ordinance. They brought ejectment upon this title, against persons in possession under a sheriff's deed for the property, which had been sold under judgment and execution against the city. The plaintiffs recovered possession in the court below, and this court sustained the judgment, holding that while the confirmation of the city's claim invested her with an absolute legal title to the property in question, it was nevertheless subject to a trust for the benefit of the inhabitants.

"By proceedings under that act," (March 3, 1851,) said Mr. Justice Field, "imperfect rights—mere equitable claims—

might be converted, by the decree of the board or courts and the patent of the Government following, *into legal titles*, but whether the legal title thus secured to the patentee were to be held by him charged with any trust was not a matter upon which either board or court was called upon to pass. The confirmation only inures to the benefit of the confirmee so far as the legal title is concerned. It establishes the *legal title* in him, but it does not determine the equitable relations between him and third parties."

2. We take it, therefore, that the adjudications, as well as the reasoning of the opinions, in these cases, have settled for this court the doctrine, that the town of San Francisco possessed, at the time of the cession of the territory, a title to lands constituting the site of the town, which, when regularly assigned by the paramount Government, were to be held in trust for the benefit of the inhabitants; that this right of the pueblo fell within the class of rights and claims to lands which this Government obligated itself by the treaty of cession to protect; that by the operation of the proceedings before the judicial tribunals provided for the adjustment of those claims, ending with the final decree of the circuit court, and by the effect of the confirmatory statute of 1866, this originally inchoate interest of the city has ripened into an indefeasible legal title to the lands within her corporate limits; that this title takes effect, in contemplation of law, by relation as of the time of the presentation of the claim to the land board; and that those who hold under the city by valid grants have the legal seizin and possession of their respective premises.

All this we claim to have been already in effect and substance decided by this tribunal.

Second.

We contend that by the effect and operation of the statute of March 8, 1866, the legal title of the land within the corporate limits passed from the United States to the city of San Francisco; and that no survey or patent was or is necessary

to the complete investiture of the corporation with the legal seizin or title of those lands.

1. The act is entitled "An act to quiet the title to certain lands within the corporate limits of the city of San Francisco," and provides:

"That all the right and title of the United States to *the land* situated within the corporate limits of the city of San Francisco, by the decree of the circuit court of the United States for the northern district of California, entered on the 18th day of May, 1865, be and the same are *hereby relinquished and granted* to the said city of San Francisco, and its successors; and the claim of the said city to *said land* is hereby confirmed," etc.

This, then, is a legislative finding and declaration that all the land situated within the limits of the city had been claimed by the city in virtue of her pueblo rights, and that the claim thus made to those lands (within the corporate limits) had been confirmed by the circuit court; and it is a confirmation of that claim, thus made and found valid by the court, to those particular lands. And upon and in pursuance of this judicial and legislative confirmation of this claim to those lands the *sovereign legislature, by its own direct and immediate act, relinquishes and grants the legal title which had theretofore remained in the United States to the city and her successors.*

A perfect title, clothed with the highest sanction and in full property, is thus transferred to the city.

We have not only a legislative confirmation of the claim to the lands within the corporate limits, but we have a positive *grant* of the fee.

This court has said many times that a grant may be made by law as well as by a patent pursuant to law; and a confirmation *by a law* is as fully, to all intents and purposes, a *grant*, as if it contained in terms a grant *de novo*.

Strother *vs.* Lucas, 12 Pet., 455.

And a grant by law, as well as a confirmation having the effect of a grant, is a much higher evidence of title than a

patent ever can be; for, as was said by Mr. Justice Baldwin, it is a direct transmission of the fee by the Government itself, whereas the patent is only the act of its ministerial officer.

Grignon's Lessee, *vs.* Astor, 2 How., 344.

After such a confirmation and grant no patent can be necessary to confer a perfect title; and it would be preposterous to requiee it.

Doe *vs.* Eslava, 9 How., 447.

It has been uniformly held by this court, in the cases of Spanish and French titles in Louisiana and Florida, that when Congress directly interposed and granted the fee, no patent was required as a further assurance of title.

Landes *vs.* Brant, 10 How., 374.

Kennedy's Ex's *vs.* Hunt's Lessee, 7 How., 586.

This statute of 1866 is to be treated, therefore, as a *patent* of the United States to the city and her successors for the lands situated within her corporate limits, issued in pursuance of the final decree of the circuit court confirming her pueblo claim to those lands.

2. Nor can any *survey* be necessary to the perfection of the title.

In the language of Mr. Justice Campbell, in Guitard *vs.* Stoddard, (16 How., 494,) "this court has not in any case decided that statutes which operate to confirm an existing and recognized claim or title, with ascertained boundaries, or boundaries which could be ascertained, are inoperative without a survey, or made one necessary to the perfection of the title."

The court is bound to presume that Congress knew that the lands embraced by the decree of the circuit court were included within the corporate limits of the city.

The statute expressly describes the lands confirmed by the decree of May 18, 1865, as "land situated within the corporate limits of the city." "The claim," the statute proceeds, "of the city to said land is hereby confirmed." What land? Clearly the land confirmed by the decree, and situated within

the corporate limits. The claim of the city is confirmed. What claim? Certainly, the claim asserted by petition to the land board in July, 1852—the pueblo claim.

The pueblo claim, then, asserted in respect of the lands within the corporate limits, is confirmed by the statute, that being the same claim confirmed by the decree of May 18, 1865; and the statute thereupon conveys to the city and her assigns the title of the United States to all those lands within the corporate limits. The boundaries of the corporation are then the boundaries of the grant. The corporate limits are fixed and ascertained lines, or can be so rendered.

The boundaries of the land thus granted are, therefore, ascertained and identified.

A survey would not aid the description and identification of the property. It is as completely segregated from the public domain as if a wall had been built around it and the courses and distances were marked by permanent monuments.

3. But a perfect legal title to the land within the corporate limits of 1851 would have vested in the city and her grantees under the Van Ness ordinance, upon the final confirmation of her claim, by operation of the 5th section of act of July 1, 1864, if the statute of 1866 had not conveyed it. As respects the interest of the United States in the land within the corporate limits, as defined by the charter of 1851, *that* had passed by the act of 1864, before the final confirmation of the pueblo claim.

After the decree of the circuit court Congress intervened by the statute of 1866, and rendered the confirmation absolute and final, and again relinquished the Government's interest in the property within the old city, and extended the relinquishment to the land within the consolidated municipality.

And, in respect to *that* land, the statute provided that the confirmation should be in trust, that it should be conveyed by the city to persons in possession at the date of the act.

Such a disposition had been previously made by the city, through the Van Ness ordinance, of the land within the charter limits of 1851. We, therefore, who are within the old

city, and claim under the Van Ness ordinance, have a double patent from the Government for our lands.

Third.

Admitting that both the titles here involved were originally inchoate and imperfect, (and it is not pretended that the Bernal title was a perfect title at the date of the cession;) that they depend for their efficiency upon the action of the Government in respect to them; that the equities are entirely equal and balance each other, what is the natural and obvious solution of the question of superior right? We contend that it is found in the doctrine—already imbedded in the jurisprudence of California land claims—that the proceeding for confirmation, when consummated, takes effect by relation at the time when it was instituted by the filing of the petition before the board of commissioners.

Applying this doctrine, the petition of the city having been filed in July, 1852, and that of the plaintiffs in March, 1853, (rec., p. 11,) in legal contemplation the title of the property passed from the Government to the city before Bernals instituted their proceedings, and there was nothing left for their claim to attach to.

They have no patent, and if they had one, it would take effect by relation on the 1st of March, 1853; but before that date, by the retrospective operation of the confirmation and grant to the city, the legal title had been transferred to her.

This principle of relation was expounded by this court, in the case of an imperfect title depending for its confirmation and sanction upon the political power, in Landes *vs.* Brant, (10 How., 372.) It was adopted from this authority at an early day by the learned justice of this court who formerly presided on the supreme bench of California, in the leading case of Waterman *vs.* Smith, (13 California, 420.)

The same authority of Landes *vs.* Brant was again relied on by him in delivering the opinion of this court in Beard *vs.* Federy, (3 Wall., 491.) And later still, in Grisar *vs.* McDowell, (6 Wall., 380,) this case is cited for the doctrine there

announced in reference to the decree in the pueblo case, that "it is to be treated in legal effect as if entered on the day the petition was presented to the board of land commissioners."

Stoddard *vs.* Chambers, 2 How., 284.
Bissell *vs.* Penrose, 8 How., 330.

The case, then, is presented of two confirmations for the same land at different dates; and in such a case the law of this court is, that the older confirmation defeats the younger.

Chouteau *vs.* Eckhart, 2 How., 345.
Le Bois *vs.* Bramell, 4 How., 449.
Berthold *vs.* McDonald, 22 How., 341.
Landes *vs.* Brant, 10 How., 370.

Again, when we consider the equities arising in each case from the confirmation of the claim by the United States, there is no method of solving the question which must be determined, of superior right, except by looking behind the confirmations and examining the progressive stages of the titles from their incipient state until their final confirmation.

Ross *vs.* Barland, 1 Pet., 665.
Doe *vs.* Eslava, 9 How., 421.

And under this rule of decision the defendants' title must prevail, for it was earlier in origin as a Mexican title, and earlier in inception as an American title, than the title asserted by the plaintiffs.

Fourth.

We have contended that, independently of the finding of the State court, as matter of fact, that the grant asserted by the Bernals before the land board was never issued by the Governor, the defendants were entitled to judgment upon the record of the several proceedings for confirmation here involved, that record showing that the pueblo claim of the city of San Francisco, having been presented to the land board in July, 1852, antedated that of the plaintiff's by a year. We now contend, that even if the rule of the cases of Landes *vs.* Brant (10 How., 372) and Ross *vs.* Barland (1 Pet., 653) is

not applicable in the manner and to the extent claimed, that the defendants are "*third persons*," within the meaning of the 15th section of the act of March 3, 1851, and, as such, are not concluded by the decree of confirmation produced by the plaintiffs and by the survey and location of the claim, or by either, and that they are in a position to go behind and impeach the right established by the record confirming the Bernal claim.

1. The 15th section of the act of 1851 provides:

"That the final decrees rendered by the said commissioners, or by the district or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants *only*, and shall not affect the interests of *third persons*." (9 Stats., 631, etc.)

This law has been once construed by this court and many times by the supreme court of California.

The case in this court is:

Beard *vs.* Federy, 3 Wall., 478.

The leading cases in the supreme court of California are the following. In all of them opinions were delivered by Mr. Justice Field, first as a justice, afterwards as the chief justice, of California:

Waterman *vs.* Smith, 13 Cal., 420.
Biddle Boggs *vs.* Merced Mining Co., 14 Cal., 362.
Moore *vs.* Wilkinson, 13 Cal., 484.
Lessee *vs.* Clark, 18 Cal., 566.
Same case, 20 Cal., 425.
Teschemacker *vs.* Thompson, 18 Cal., 27.
Ely *vs.* Frisbee, 17 Cal., 259.
Stark *vs.* Barrett, 15 Cal., 366.

These cases rather determine practically who are *not* "third persons," within the meaning of the act of 1851, than who are such persons. But whether we regard the actual judgments, or the *dicta*, of the court, in those cases, they settle beyond all propriety or possibility of doubt, that a claimant of

land under a grant emanating from Mexico before the acquisition of California, which has been judicially ascertained to be valid against the United States, and which has been finally confirmed by the action of the tribunals or Government of the United States, and who is in possession of the land under such grant and confirmation, is in a position to impeach any other grant which, under a decree of confirmation, may be employed by an adverse claimant in an action of ejectment to obtain possession of the property. That is our situation in respect to the premises in controversy. We are, and have been for nearly twenty years, in possession of the property, claiming it under the pueblo title, which emanated from the same source as that to which the Bernal title is referred. We have a final confirmation of that title by the supreme authority of the United States. Our possession and right of possession are now sought to be disturbed by a claimant who, so far as his original title, and so far as his right by the confirmation of his claim are concerned, can stand on no higher or better footing than ourselves. And we simply ask, under the authority of the act of 1851, that we be permitted to defend our possession by showing that his alleged grant is a fiction. If we cannot do that, then the 15th section of the act of 1851 is a nullity. It cannot be that this court will ever sanction a construction of this statute which would deprive us of such a right. If the 15th section of the act of 1851 was not made for that, it was made for nothing.

Now for the cases.

In Beard *vs.* Federy, (3 Wallace, 489,) the opposing title was under a grant which had never been presented for confirmation to the land commission, nor had it been presented to the departmental assembly for approval before the Mexican rule terminated, (July 7, 1846.) The claim was abandoned, therefore, by force of the act of 1851, and the court held the party asserting it could not impeach the plaintiff's patent.

In Waterman *vs.* Smith, (13 Cal., 420,) the contest was between two Mexican grants of land within the same exterior boundaries. The defendant's grant had not been finally confirmed; it was in the Supreme Court on appeal. Being in

possession, he attempted—not to impeach the plaintiff's grant, which had been finally confirmed—but to impeach the survey and location. This power was denied him.

In Biddle Boggs *vs.* Merced Mining Company, (14 Cal., 363,) a lessee of Fremont brought ejectment against a pre-emptioner under the United States. The defence was fraud in the survey and procurement of the patent. The court said: "Any rights the defendants possess were subsequently acquired, and must be subordinate to the proceedings then pending by the grantees before the tribunals of the United States." This is not our case, nor our defense.

In Moore *vs.* Wilkinson, (13 Cal., 484,) the action was ejectment by a patentee of a confirmed claim against pre-emption settlers. The court say: "The patent took effect by relation at the date of the presentation of the petition of patentees to land board, in March, 1852. At that time the pre-emption laws of the United States, under which defendants claim, had not been extended to California."

In Lessee *vs.* Clark, (18 Cal., 566; 20 *ib.*, 413,) the action was ejectment by grantee of lot in San Francisco, whose claim had been confirmed by land board against persons holding under grants made in 1847, by alcaldes of the pueblo, but which had never been confirmed. The defendants did not question the *genuineness* of the grant to Lessee, but its *location.* The court held, that inasmuch as the defendant's claim was under the United States alone, and arose subsequently to the plaintiff's petition to the land board, it was barred by plaintiff's patent, which related back.

There is nothing in this decision that affects our case.

The court here define "third parties:"

"Who are the third persons mentioned in the 15th section, against whom the decree and patent are not conclusive? We answer, they are not *intruders*, nor *pre-emptioners* claiming under the laws of Congress, nor *locators* of school warrants, nor any other persons whose interests have been acquired *since* the acquisition of the country, when the obligation to protect existing rights of property devolved on the United States. The term 'third persons' refers not to all persons other than the United States and the claimants, but to those

who hold independent titles arising *previous* to the acquisition of the country. The latter class are not bound by the decree and patent, for they do not hold in subordination to the action of the Government, nor by any title subsequent, but by title arising anterior to, the conquest." (20 Cal., 425.)

The defendants are, within the very letter of this doctrine, "*third persons.*"

Ely *vs.* Frisbee (17 Cal., 259) and Stark *vs.* Barrett (15 Cal., 366) were cases of attempts by pre-emptioners or settlers under the United States to impeach the survey and location of Mexican grants. These cases, and others like them that might be cited, are fair illustrations of the prevaling doctrine on this subject in California. Not one of them, however, touches the case of a party in possession of land under a Mexican grant, made before the conquest, which has been finally confirmed by the United States, and has thus become a perfect title, who seeks to protect his possession by inquiring into the validity of an adverse *title* of the same description and dignity as his own. The presumptions arising upon the decrees of confirmation may be said to be even. We, however, are in possession.

Why should we not be allowed, at least, to maintain our possession by showing that we have the better right; and how can we do it without assailing and putting in issue the plaintiffs' title?

2. We contend that a patent under the act of 1851 is not conclusive against an adverse claimant who is in possession of land, and claims it in virtue of a final decree of confirmation. But the defendants in this case are vested with the absolute legal title of the land, as we have contended, by the action of Congress, in confirming the decree of the circuit court and granting the fee to the city. They have a "perfect title" in the strictest sense. Their right, which had its inception under the Mexican Government, has been taken up by our Government and converted, in due course of law and legislation, into an absolute, indefeasible legal estate.

If the city and her grantee possessed only an equitable title before the act of 1866, the equity was clothed with the *fee*

by that statute. The land has been duly segregated from the public domain, and they are in possession of it under a patent of the Government.

Are they not, then, according to the strictest rule which can be applied, "third persons," who are not concluded by the plaintiffs' decree? If the defendants could have been turned out before the statute by force of the plaintiffs' decree and survey, can they now be dispossessed?

What superior virtue and dignity has the plantiffs' title? It was originally of the same inchoate character as their own. It was not, as derived from Mexico, a "perfect title." It required, as well as their own, the confirmation of this Government. It has received the same sanction as their own. Both grants have attached to a specific tract of land. What can restrain the defendants, then, from going behind the plaintiffs' record and destroying the foundation of their title, or invalidating the survey which has located their claim on the defendants' possession?

3. But it may be said that in so far as the survey is concerned the defendants are estopped by the previous proceedings in regard to it from further contesting its validity. That, however, cannot be, for at the time of that contestation they were not possessed of the title which they now exhibit, and their right to intervene and assail the survey was denied in the district court and in this court upon the sole ground that they wanted the very interest and title which are now brought to the attention of the court. If they had been able to set up in the previous proceeding the title on which they now rely, there is no doubt that the court would have heard their objection to the Bernal survey.

Will the court now refuse them the right which, in that event, it would have then accorded to them?

Whether concluded or not, however, on the question of the survey, the defendants are not concluded upon the question of the plaintiff's title. That question they have never had an opportunity or occasion to meet.

Without reference to the survey, they now propose to go behind the plaintiff's decree to the original claim, and prove

that it was founded on a fiction. As possessors of an equal, if not a superior, right to this land, they think there is nothing in the plaintiffs' character or status which can deprive them of the right to do this.

Fifth.

The only other question which seems to remain is, whether there is anything in the exception contained in the decree of the circuit court of May 18, 1865, which excludes the land now in controversy from the confirmation there made to the city of San Francisco.

1. We contend that the exception in the decree at most only comprehends lands to which perfect titles were acquired by persons from the government of Mexico, and to which such titles were subsisting when California was acquired by the United States, and does not extend to inchoate or equitable titles, such as the title of the Bernals, which did not attach to any particular land, of which the grantees were in possession at the time of the acquisition of California.

While it may be conceded that a person in possession of land within the pueblo limits by perfect title derived from the source of paramount proprietorship, before the time of the conquest, may be within the protection of the exception in the decree of the circuit court, we can never admit, until it is decided by this court, that it was the intention of the learned circuit court to exclude *absolutely* from the confirmation to the city all lands claimed under decrees and surveys made in virtue of mere equitable rights derived from Mexico, and preclude the city and those holding under her from instituting investigation into those rights, and the action of the officers of this Government in locating them upon the lands in possession of the municipality under the pueblo title.

The words of the decree sustain our position; they are, "such *parcels* of land as have been by grants from lawful authority *vested* in private proprietorship, and have been finally confirmed by parties claiming under said grants by the tribunals of the United States."

It is not pretended that the Bernal grant vested this land in Bernal proprietorship. It never attached under the former government to any tract of land, and was, if anything, under that government, nothing but an equitable title. We think it clear that the decree does not except lands claimed against the city under such a right from the confirmation, but that it intended to subject such titles to the same investigation, when asserted against "third persons," as they may be subjected to under the 15th section of the act of 1851.

2. However it may be as to lands in the pueblo limits held and possessed under perfect titles subsisting on the acquisition of California, there cannot be a doubt, from the language of the decree, that it was the intention of the circuit court to give to the city the right, in the case of titles of a different description, when sought to be deprived of the lands confirmed to her, by means of previous decrees and surveys confirming and locating such claims, to contest the existence and validity of the asserted grants.

It will be observed that the decree is careful not to except all lands finally confirmed, but lands granted by lawful authority, *and* finally confirmed to parties claiming under such grants.

The inquiry is twofold; 1st. Was the land granted by lawful authority? 2d. Was the grant finally confirmed? Both issues may be raised by the city, and unless both are determined against her, she, or those holding under her, cannot be dispossessed.

If it had been the intention of the court to except all lands finally confirmed by decrees of courts, and to estop the city from contesting the validity of the confirmations, it would have simply provided, that lands finally confirmed were excluded from the confirmation. But it did not do so. It required the parties to show both that they had lawful, valid grants, and that these grants had been duly confirmed by the tribunals of the United States.

If they could show only one fact, they were not intended to be embraced by the exception. To bring them within the exception, it was required that that they should comply with both conditions.

Moreover, it is perfectly apparent that the learned circuit court did not intend to deprive, or to attempt to deprive, the city of the benefit of the 15th section of the act of March 3, 1851, an act under which the court acquired its jurisdiction to determine the city's claim. Under that section the city, as a "third person," had a right to contest the title of the plaintiffs. This decree was not conclusive against her. If, therefore, the decree in the "pueblo case" gives another and different effect to that decree from what it would have had under the act of 1851, it operates as a repeal of a most important provision of the statute under which the court was acting in pronouncing this very judgment.

3. It may be remarked, in conclusion, that the statute of March 8, 1866, while it adopts the exceptions of the decree, provides expressly for the *judicial examination and adjustment* of all valid adverse rights or claims to the lands within the corporate limits. Thus, it would clearly appear to have been the intention of Congress to subject every title claimed from Mexico, and asserted against the city, or those holding lands under her, within those limits, to judicial examination, and as a legislative construction of the decree this provision is of the highest authority, independently of its force and effect as the law of the land.

This action has afforded us the only opportunity we have ever had to assail the title under which the plaintiffs would deprive us of property we have peaceably occupied for nearly twenty years. We have shown, and the State court has found, that this confirmation was obtained upon a false claim. It would be, we respectfully submit, to the discredit of our jurisprudence, if, in the face of this fact, thus judicially ascertained, the law should require us to deliver possession of the property to the plaintiffs [redacted].

Sixth.

The judgment of the supreme court of California should be reversed.

J. HUBLEY ASHTON,
Of Counsel for Plaintiffs in Error.

Supreme Court of the United States.

MICHAEL LYNCH, et als.,

Plaintiffs in Error,

VS.

CARMEN S. DE BERNAL et al.,

Defendants in Error.

Brief for Plaintiffs in Error.

ACTION FOR THE POSSESSION OF REAL PROPERTY.

GEO. H. WILLIAMS,

Counsel for Plaintiffs in Error.

J. L. Pearson, Printer, corner 9th and D streets.

Supreme Court of the United States.

MICHAEL LYNCH ET AL., *Plaintiffs in Error*,

VS.

CARMEN S. DE BERNAL ET AL., *Defendants in Error.*

Brief for Plaintiffs in Error.

ACTION FOR THE POSSESSION OF REAL PROPERTY.

Bernal relies upon a title derived from the decree of the United States District Court of California, made in 1856, confirming a Mexican land grant to the land in question, pursuant to the act of March 3d, 1851.

Assuming the validity of this decree, it is subject to the fact found by the court below—that, at the time it was made, the claim thereby confirmed "was without any valid foundation in law or equity," and that, in fact, no such grant as is described in said decree was ever made.—(Record, 18.)

But the decree is void because the board of commissioners, at the time of its rendition, had no jurisdiction of the subject-matter.

Bernal's petition to the board was for the confirmation of a two hundred vara lot, which lot, at the time said petition was filed, and now is, within the corporate limits of San Francisco.—(Record, 10.)

Upon said board no authority is conferred by the act of 1851 to hear and determine such a case, but section 14 of said act, in effect, provides that confirmation of lands within the limits of a city shall be made to the corporate authorities, and the right of application to the board by individual lot-holders is denied.—(Statutes at Large, vol. 9, page 634.)

Lynch, and those under whom he claims, were, on the 1st of January, A. D. 1855, and now are, in possession of the property, (Record, p. 16,) and claim a right to hold it against said decree by virtue of title derived from the pueblo or city of San Francisco, and rely upon the decisions confirming pueblo title.—(Dwinelle Cal. His. San Francisco, pp. 147 and 228; the Van Ness Ordinance, ibid., p. 217; the act of the California legislature, ratifying said ordinance, ibid., 216; act of Congress of July 1, 1864, U. S. Statutes, vol. 13, p. 232, Dwinelle, 255; and the act of Congress of March 8, 1866, U. S. Statues, vol. 14, p. 4, Dwinelle, 357.) Which decisions and acts, if they do not vest Lynch with a perfect title, give him a status in court as a third person within the meaning of section 15 of the act of Congress of March 3d, 1851.

Bernal, it must be admitted, has no title to the property in question, and necessarily, therefore, must fail in this action, unless the record which he produces is valid and estops Lynch from presenting, and the court from considering, that fact.

Proceedings were had in court to which the United States and Bernal were parties, and by which Bernal's claim was confirmed. Lynch was not a party and had no notice of those proceedings; but, after the decree was made, Lynch filed a petition to have the survey made un-

der it revised and corrected, upon which there was litigation and a judgment by the court.

Lynch, in this proceeding as to the survey, could not attack the validity of the original decree or raise the question as to title.

1 Wallace, 282.

5 Wallace, 827.

Lynch has never had his day in court as to the question of title, nor has he been a party to any litigation upon that subject.

Whether there was a grant to Bernal or not is one question, but it is altogether another as to the survey and location of the boundaries.

Lynch might have had no interest in the question of title if the survey had been made in accordance with his wishes.

Suit between two parties does not bind a third person, unless such third person can be admitted to make a defence, examine witnesses, or appeal from the judgment.

Phillips E., 222.

Estoppels are said to be odious and not favored by the law.

3 Johnson Cases, 101.

Section 15 of the act of 1851 provides that the decree of confirmation and patent shall be "conclusive between the United States and the claimants only, and shall not affect the interests of third persons."

Is Lynch a third person within the meaning of this section?

Justice Field, in Beard vs. Federy, 3 Wallace, 493, defines third persons, as described in this statute, to be those "who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property."

Assuming this to be a correct exposition of the act, then Lynch is not bound by the decree for Bernal, for Lynch has the pueblo title, which antedates the pretended title of Bernal, and which, in a litigation with the United States, has been confirmed; and so he holds under a title by which the action of the government in claiming the property was successfully resisted.

Suppose there were no Bernal decree, could the government divest Lynch of the title to this property, acquired under the Van Ness Ordinance? Is Lynch to be deprived of property to which he otherwise has a perfect title because he did not successfully resist the action of the government in the case of Bernal vs. The United States, when he had no right or power to resist such action?

Is it not absurd to deny to Lynch the right to show that he has a title superior to any other, and then eject him from the property on the ground that he had no such title?

But it is respectfully submitted that the term "third persons" in the act of 1851, means just what it does in other legislative enactments, and in its common acceptation by the courts.

Lynch and those under whom he claims have been a long time in possession of the property in question, claiming to own it, and this is an interest everywhere recognized and protected by law, and which cannot be affected by Bernal's decree.

Suppose Congress had said, in the words of the statute,

that a decree under said act shall be conclusive between the United States and the claimants *only*, and stopped?

Would there be any room for construction?

Could the court say that the decree did conclude other persons?

Is the force of the section weakened by the additional words "and shall not affect the interests of third persons?"

Arguments *ab inconvenienti* will not avail to defeat the plain meaning of a statute. It is to be presumed that they were considered and overruled by Congress.

Who are those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property?

Section 13 of the act of 1851 declares that "all lands, the claims to which shall not have been presented to said commissioners within two years after the date of this act, shall be deemed, held, and considered as a part of the public domain of the United States;" and in United States vs. Fossatt, 21 Howard, 445, this court say, referring to said act of 1851 and its amendments:

"These acts of Congress do not create a voluntary jurisdiction that the claimant may seek or decline. All claims to land that are withheld from the board of commissioners during the legal term for presentation are treated as non-existent, and the land as belonging to the public domain."

All Mexican claims, therefore, it would seem are on the same footing so far as the "action of the government in disposing of the property is concerned."

Does this court propose to decide that a lot-holder in San Francisco, claiming under the Van Ness Ordinance

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All Mexican claims, therefore, it would seem are on the same footing so far as the "action of the government in disposing of the property is concerned."

Does this court propose to decide that a lot-holder in San Francisco, claiming under the Van Ness Ordinance

and other legislative and judicial proceedings confirming title to the city, has no interest in his lot?

If he has an interest may he not resist a decree, without "any foundation in law or equity," of the existence of which he may be entirely ignorant until suit is brought against him upon it?

Two confirmations have been made of the land in question—one to the city of San Francisco and the other to Bernal.

When such is the case the court will go behiud the decrees, examine into, and decide according to the original equities of the parties.

Bullard vs. McDonald, 22 Howard, 334.

1 Hoffman's Land Cases, 298.

GEO. H. WILLIAMS,

Counsel for Plaintiffs in Error.

Supreme Court of the United States.

No. 305.

MICHAEL LYNCH et als., Plaintiffs in Error,

vs.

CARMEL S. De BERNAL et als., Defendants in Error.

Brief for the Defendants in Error, on the Merits.

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In the Supreme Court of the United States.

MICHAEL LYNCH *et als.*,
Plaintiffs in Error,
vs.
CARMEL S. DE BERNAL *et als.*,
Defendants in Error.

No. 305.

BRIEF FOR THE DEFENDANTS IN ERROR, ON THE MERITS.

At the last term of the court, the defendants in error moved the court to dismiss the writ for want of jurisdiction. It is understood that the court postponed, rather than denied, the motion. If this be so, the counsel for the defendants in error desires it may be considered with the merits. Even without a motion to that effect, the court, on the authority of Armstrong *et als. vs.* Athens County, (16 Pet., 284,) will examine into and pass upon the question of jurisdiction.

ARGUMENT.

I. The parties to the controversy claim the demanded premises under Mexican titles. The plaintiffs in error, under the Pueblo title. The defendants in error, under a colonization grant within the Pueblo lines.

The effect upon the question of jurisdiction over these two rival claims will be first considered.

The defendants in error relied, in the court below, upon their grant. And defied attack upon it, because it was evidenced and upheld by the confirmation of the board of land commissioners on August 8, 1854, and by the district court of the United States on March 24, 1856; the whole consummated by the abandonment of appeal from the decree by the United States on April 2, 1857, consenting to proceeding to a survey and patent, as under final decree.

The plaintiffs in error relied for their defense upon the Pueblo title, as conferred upon them by the Van Ness ordinance, giving the city title to those in possession on January 1, 1855, and ratified by the State of California in 1858, (Stats., p. 52,) by the relinquishment of title of the United States to the city by the act of July 1, 1864, and the act of March 8, 1866, which is couched in the following words:

"That all the right and title of the United States to the 'land situated within the corporate limits of the city of San 'Francisco, in the State of California, confirmed to the city 'of San Francisco by the decree of the circuit court of the 'United States for the northern district of California, entered 'on the eighteenth day of May, one thousand eight hundred 'and sixty-five, be, and the same are hereby, relinquished 'and granted to the said city of San Francisco and its suc- 'cessors, and the claim of the said city to said land is hereby 'confirmed, subject, however, to the reservations and excep- 'tions designated in said decree, and upon the following 'trusts, namely, that all the said land, not heretofore granted 'to said city, shall be disposed of and conveyed by said city 'to parties in the *bona fide* actual possession thereof, by them- 'selves or tenants, on the passage of this act, in such quanti- 'ties and upon such terms and conditions as the Legislature 'of the State of California may prescribe, except such parcels

'thereof as may be reserved and set apart by ordinance of 'said city for public uses: *Provided, however*, That the relin- 'quishment and grant by this act shall not interfere with or 'prejudice any valid adverse right or claim, if such exist, to 'said land or any part thereof, whether derived from Spain, 'Mexico, or the United States, or preclude a judicial exami- 'nation and adjustment thereof."

The plaintiffs in error maintain that these municipal and legislative proceedings enable them to ascend to the original Pueblo title as against us; and, therefore, that whether the public title antedate ours or not, it enables them, in quality of third persons, to go behind our confirmation, and attack the grant which it recognizes and enforces.

II. Are the successors to the Pueblo title third persons? Third persons, in this sense, have been defined to be as follows:

"The third persons against whose interests, by the 15th 'section of the act of 1851, the final confirmation and patent 'are not conclusive, are those whose title is at the time such 'as to enable them to resist successfully any action of the 'government in respect to it."

Waterman *vs.* Smith, 13 Cal., 420.

"The term 'third person' refers not to all persons other 'than the United States, but to those who hold independent 'titles arising previous to the acquisition of the country. The 'latter class are not bound by the decree and patent, for they 'do not hold in subordination to the government, nor by any 'title subsequent, but by title arising anterior to the conquest.'

Leese v. Clark, 20 Cal., 425.

"The third persons, against whose interests the action of 'the government and patent are not conclusive under the '15th section of the act of March 3, 1851, are those whose

'title accrued before the duty of the government and its 'rights under the treaty attached."

Teschemacher v. Thompson, 18 Cal., 27.
DeArguello v. Greer, 26 Cal., 626.
Minturn v. Brower, 24 Cal., 669.

What right had the Pueblo prior to the date of our title? Could the Pueblo or its successors have successfully resisted any action of the Mexican authority in dealing with the land within the Pueblo lines?

The answer is, that the title being merely an equity, the political department of the government, by making within the lines grants that ripened into legal titles, *pro tanto*, extinguished that equity.

Therefore, the Pueblo and its successors, being unable to resist "successfully any action of the government" in respect to our grant, cannot be considered as "third persons" now competent to attack it.

And here, it may be useful to consider the character of a Pueblo. What was its origin? The King of Spain created it in the sixteenth century.

[Recopilacion de Leves de Los Reynos de las Indias. Libro IV, Titulo V, Ley VI Ordenanza del Rey Don Felipe II.]

LEY VI.—*Que la capitulacion para Villa de Alcaldes ordinarios, y Regidores, se haga conforme á este ley.*

"Si la disposicion de la ti-
'erra diere lugar para poblar
'alguna Villa de Españoles,
'con Concejo de Alcaldes or-
'dinarios, y Regidores, y hu-

LAW VI.—*The conditions for a town of Alcaldes with the ordinary jurisdiction and Councilmen (Regidores) shall be agreeably to this law.*

"If the nature of the tract
'of land allow of some town
'(villa) of Spaniards with a
'Council of Alcaldes of the
'ordinary jurisdiction and

‘ viere persona que tome assi-
‘ ento para poblarla, se haga
‘ la capitulacion con estas cal-
‘ idades: Que dentro del ter-
‘ mino, que le fuere señalado,
‘ por lo menos tenga treinta
‘ vecinos, y cada uno de el-
‘ los una casa, diez bacas
‘ de vientre, quartro, quatro
‘ buyes, ó dos bueyes, y dos
‘ novillos, una yegua de vien-
‘ tre, una puerca de vientre,
‘ viente ovejas de vientre de
‘ Castilla, y seis gallinas, y un
‘ gallo: assimismo nombrará
‘ un Clerigo, que administre
‘ los Santos Sacramentos, que
‘ la primera vez será á su
‘ eleccion, y las demás con-
‘ forme á nuestro Real Pa-
‘ tronazgo; y proveerá la Igle-
‘ sia de ornamentos, y cosas
‘ necessarias al culto Divino,
‘ y dará fianzas, que lo cum-
‘ plirá dentro del dicho tiem-
‘ po: y si no lo cumpliere,
‘ pierda la que huviere edifi-
‘ cado, labrado y grangeado,
‘ que aplicamos á nuestro
‘ Real Patrimonio, y mas y
‘ incurra en pena de mil pe-
‘ sos de oro para nuestra Cá-
‘ mara; y si cumpliere su
‘ obligacion, se le dén quatro
‘ leguas de termino y terri-
‘ torio en quadro, ó prolon-
‘ gado, segun la calidad de la
‘ tierra, de forma que si se

‘ Councilmen (regidores,) and
‘ there be some persons who
‘ undertake by contract to
‘ settle it, let the agreement
‘ be made under these condi-
‘ tions: That within the pe-
‘ riod of time which may be
‘ assigned to him he must
‘ have at least thirty settlers,
‘ each one provided with a
‘ house, ten breeding cows,
‘ four oxen, or two oxen and
‘ two steers, one brood mare,
‘ one breeding sow, twenty
‘ breeding ewes of the Cas-
‘ tilian breed, and six hens
‘ and one cock; he shall also
‘ appoint a priest to adminis-
‘ ter the Holy Sacrament; the
‘ first time he shall select him,
‘ but afterwards the appoint-
‘ ment shall be subject to our
‘ Royal Patronage; and he
‘ shall provide the Church
‘ with ornaments and the
‘ things necessary for Divine
‘ Worship; and shall give
‘ bonds for the performance
‘ of all this within the time
‘ agreed upon; and if he
‘ should not comply with his
‘ obligation he will lose what-
‘ ever he may have construct-
‘ ed, wrought, or garnered,
‘ to be applied to our Royal
‘ Patrimony, and will further-
‘ more incur the penalty of
‘ one thousand pounds of

'deslindare, sean las quatro 'leguas en quadro, con cali- 'dad de que por lo menos 'disten los limites del dicho 'territorio cinco leguas de 'qualquiera Ciudad, Villa, ó 'Lugar de Españoles, que 'antes estuviere poblado, y 'no haga perjuicio, á ningun 'Pueblo de Indios, ni de per- 'sona particular."

'gold for our treasury; and 'if he should comply with his 'obligation, there shall be 'given to him four leagues 'of extent and territory, in a 'square or prolonged form, 'according to the character 'of the land, in such manner 'that if surveyed there shall 'be four leagues square— '(four leagues of extent and 'territory in a square,) with 'the condition that the limits 'of said territory shall be 'distant at least five leagues 'from any city, town, or vil- 'lage of Spaniards previous- 'ly founded, and that there 'shall be no prejudice to any 'Indian town or private per- 'son."

As the four leagues were to be measured off according to the character of the land, it is plain that, without a survey, no one could point out with anything like precision the body of land belonging to the Pueblo of San Francisco. The Spanish mode of surveying would have been by drawing lines from the centre of the public square in the direction of the four cardinal points. But the plaza is so near the bay, that the quantity would have had to be made up in other directions. The rule, then, as to the equitable character of the title applies, in this case, with peculiar force. For the refusal of the Governor to make a grant because the Pueblo has a right to some *uncertain four leagues* of land, would have been equivalent to a suspension of the colonization laws.

It is obvious that the public authorities must have deter-

mined by a survey that the Pueblo was entitled to a specific tract of land before its title could be deemed to be of any grade higher than that of a mere *float*. And can it be said that such a bare right or interest, such a mere *germ* of a title, enables its possessor "resist any action of the Government in disposing of the property?"

For the existence of this power is the test of the character of the claim.

See Beard *vs.* Fidery, 3 Wall., 493.

A title wholly within the power of the Government, and depending, to be made consummate, upon its mere sense of justice, to be enforced at will, and at the time and in the manner it may choose, is a title of the lowest grade, and one whose possessor is not to be dignified with the name of a "third person." And yet the court below, of whose decision the plaintiffs in error complain, permitted them to litigate as "third persons," and even, then, found theirs the inferior title.

This view of these two titles serves a double purpose. It shows that the issue tendered by our adversaries is an issue of rivalry between two foreign grants, and therefore one, the disposition of which is not confided to this court by the act of 1789. And it shows that ours is a title of such a character as persons in the position of our adversary are not permitted to assail.

This idea is further confirmed by the language of this court in Beard *vs.* Federy, 3 Wall., 489:

"The board having acquired jurisdiction, the validity of 'the claim presented, and whether it was entitled to con- 'firmation, were matters for it to determine, and its decis- 'ion, however erroneous, cannot be collaterally assailed on 'the ground that it was rendered on insufficient evidence.

'The rule which applies to the judgments of other inferior 'tribunals applies here, that where it has once acquired juris- 'diction, its subsequent proceedings cannot be collaterally 'questioned for mere error or irregularity."

II.

1. The argument has thus far proceeded upon the assumption of the existence of the Pueblo title, and its consequent right to four leagues of land, which include the demanded premises. The record, however, contains nothing on that head which is not mere assumption. It may be that the court will take judicial notice of the existence of the Pueblo. But no reason is at present perceived why this should be done. As there is no proof in the record that the city of San Francisco ever presented the Pueblo claim to the board for confirmation, even if the court should judicially know of the Pueblo's existence and consequent right to the four leagues, it must follow, so far as this record informs us, that the land fell into the mass of the public domain.

"All lands the claims to which have been finally rejected "by the commissioners in manner herein provided, or which "shall be finally decided to be invalid by the district or "supreme court, and all lands the claims to which shall not "have been presented to the said commissioners within two "years after the date of this act, shall be deemed, held, and "considered as part of the public domain of the United "States." (Act of March 3, 1851. Extended one year by act of June 10, 1855.)

It may be contended that because the court was once informed that the claim was presented, the fact cannot now be ignored. The court certainly was so informed when the *mandamus* ordering an appeal was allowed.

But if that may avail the plaintiffs in error, the defendants in error may insist on the further judicial knowledge of the court, viz, that the appeal was not and now cannot be prosecuted, because, pending the appeal, this court being seized of jurisdiction in the premises, Congress conveyed the Government claim to the city of San Francisco, as successor to the Pueblo title. (Act of 8 March, 1866.) It results, therefore, that the claim never was finally confirmed by the court. For the confirmation from which the appeal was taken was final only for the purposes of an appeal.

If, prior to the expiration of the five years, a survey had been made, and a patent issued, and this court had reversed the decree, the patent would have been void. (Pacheco's case, 20 How., p. 261.)

The confirmation of the Pueblo claim was but a confirmation in *embryo*. Before, by the lapse of the five years it had grown to maturity, its existence as a finality was suspended by the appeal, and before its force could be restored by the stamp of this court's approbation, it fell, still-born, in consequence of the action of the Government in surrendering the property to the other side.

Therefore, whether we regard the Pueblo claim, so far as concerns this record, as one not presented for confirmation, or one which, though presented, has not been, and now cannot be, finally confirmed, it is clear that persons holding under the Van Ness ordinance take nothing by the Pueblo title, but get their rights *originally* from the United States Government by a legislative grant contained in the acts of 1864 and 1866. These acts are, to the holders under the city, equivalent to a patent.

Grignon *v.* Astor, 2 How., 319.

Guitard *v.* Stoddard, 16 How., 494.

We now see the true source of the title of the plaintiffs in error. It is the United States Government. The Pueblo title having been an equity, the legal title to the land was in the United States. And that legal title there remained, so far as concerned the city and its successors, until the passage of act of Congress of July 1, 1864.

But on that day, the legal title to the demanded premises was not in the United States. That portion of these Pueblo lands had been already conveyed to the defendants in error.

On April 2, 1857, when the government appeal was dismissed, their confirmation became absolutely final. (Record, p. 13.) And the survey which was made pursuant to the act of June 14, 1860, was advertised, and was duly confirmed by the court August 3, 1863, and afterward by this court. (Rec., pp. 13, 15.)

Under the provisions of the act last named, the publication of the survey, or its confirmation, rendered it equivalent to a patent.

"That the said plat and survey, so finally determined by 'publication, order, or decree, as the case may be, shall have 'the same effect and validity in law as if the land so surveyed 'had been patented by the United States."

See the act.

Thus, it is seen that there was conferred upon the plaintiffs in error, that which is the equivalent of a patent; and upon the defendants in error, that which is the equivalent of a patent. But the confirmation of the claim of the defendants in error on April 2, 1857, takes effect, by relation, from the date of filing their petition before the board, March 1, 1853. (Rec., p. 11.)

And thus it appears that their title is *the elder by more than eleven years.*

This view would seem to be conclusive. But if it were not, the record shows the plaintiffs in error to be estopped from further attacking our claim. They made themselves parties to the controversy in the United States district court, and are bound by its decree. (Rec., p. 15.)

They endeavor to escape from this obvious consequence of their acts, by urging that the proceedings referred to the boundaries, and not to the merits of the claim. But it is obvious that the adjustment of the lines involved questions as vital in their character as any others in the cause. Early in the jurisprudence of this court, touching these cases, this question was settled. And the decision has never been questioned.

"What are the questions involved in the inquiry into the 'validity of a claim to land?

"It is obvious that the answer to this question must de-'pend, in a great measure, upon the state and condition of 'the evidence. It may present questions of the genuineness 'and authenticity of the title, and whether the evidence is 'forged or fraudulent; or, it may involve an inquiry into the 'authority of the officer to make a grant, or whether he 'was in the exercise of the faculties of his office when it was 'made; or, it may disclose questions of the capacity of the 'grantee to take, or whether the claim has been abandoned 'or is a subsisting title, or has been forfeited for a breach of 'conditions. Questions of each kind here mentioned have 'been considered by the court in cases arising under this 'law.

"But, in addition to these questions upon the validity of 'the title, there may arise questions of extent, quantity, loca-'tion, boundary, and legal operation, that are equally essen-'tial in determining the validity of the claim.

"In affirming a claim to land under a Spanish or Mexican 'grant to be valid within the law of nations, the stipulations 'of the treaty of Guadalupe Hidalgo, and the usages of those

'governments, we imply something more than that certain 'papers are genuine, legal, and translative of property. We 'affirm that ownership and possession of land of definite 'boundaries rightfully attach to the grantee. . . . The 'opinion of the court is, that the power of the district court 'over the cause, under the acts of Congress, does not termi-'nate until the issue of a patent conformably to the decree."

United States v. Fossatt, 21 How., 446, 450.

Against the pretensions of our adversaries we invoke the plea *res judicata*. That plea requires identity in the parties, in the question, and in the subject-matter. This case supplies them all. The subject of the controversy was the demanded premises. The plaintiffs in error intervened in the district court, and the question was as to the validity of our title up to the lines we claimed, and inclusive of the intervenors' possession. The judgment was against them, and they appealed—only to have it affirmed. It is of no moment that they were forbidden to attack our grant, *as a grant*. They denied we had any title of any kind to the premises now in dispute, and what the motives of this denial were is foreign to the question. Our title to *that* land they put in issue. And whether their reasoning were that our grant, though a valid grant, did not cover it, or that we had no grant at all, is quite immaterial. If they did not wish to be bound by the decree that *might* be rendered in our favor, they should have kept aloof from the controversy. They entered into it. Had they succeeded, of course we should have heard no more of them. They failed, and now attack us again. But the proceeding on confirmation, from filing the petition, to settling the boundaries, is a *unit*. And whoever takes part in one portion of it, in legal contemplation, takes part in all.

The acts of Congress touching this subject always refer to

the purpose of their passage as being "to expedite the settlement of land titles in California."

The plaintiffs in error contend that by the act of 1864 the door was opened for an attack on titles such as ours; that they were empowered to compel us, once more, to show the validity of our claim.

Is it possible that this Government, after forcing us into its courts on pain of confiscation, and having awarded to us its most authentic evidence of the justice and validity of our claim, should intend to empower a private litigant to make fresh war on us?

For such is the construction contended for. For years we had had the Government title. We were forced to ask for it, and to offer our own to be merged in, and made part of, it. And can it be possible that the Government intended to have the controversy opened up again? If so, the title of these acts should be changed. They should no longer be called acts to *expedite*, but acts to *prolong*, the settlement of land titles in California.

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